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CONSTITUTIONAL HISTORY  
OF  
THE UNITED STATES

FROM THEIR DECLARATION OF INDEPENDENCE  
TO THE CLOSE OF THEIR CIVIL WAR

BY  
GEORGE TICKNOR CURTIS

*IN TWO VOLUMES*

Vol. I.

NEW YORK  
HARPER & BROTHERS, FRANKLIN SQUARE  
1889

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## PREFACE.

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MORE than thirty years ago I published a work, in two volumes, entitled "History of the Origin, Formation, and Adoption of the Constitution of the United States, with Notices of its Principal Framers." It met with favor and found its way into many public and private libraries throughout the country. It ended with the adoption of the Constitution by two more than the number of states requisite to give it operation. It was my intention, at some future time, to follow down the Constitutional history of the United States through the adoption of the first twelve, and the succeeding amendments. Circumstances, however, delayed, and for some years frustrated, the fulfilment of this purpose. The beginning of the Civil War, in 1861, seemed to indefinitely postpone the time when I could undertake an enlargement of my existing work; for until that terrific contest should be ended, it could not be known whether we were still to have the Constitution which was bequeathed to us by the statesmen who made it and the generation which put it into execution. And after the war was ended by the triumph of the Federal arms, many more years elapsed before I could feel that the Constitution had come out of the turmoil with its principles in a fair state of preservation. Now, however, we may confidently believe that we and our posterity have escaped the calamities which a loss of the Constitution would have entailed. I, therefore, now commit to the indulgent consideration of the public, along with the text of my original work, the result of many years of faithful labor, in which I have traced the Constitutional history of the United States through the period when the later amendments were adopted and put in operation, and when our country had entered upon a new era.

If the historical accuracy of my former work has ever been called in question, I have not been aware of it. Nor have I met with anything in the writings of other authors who have since treated the same subject which has led me to doubt the correctness of my statements, or the soundness of my interpretations. The work to which I refer has been so often consulted and relied upon by those who have had to construe the Constitution that I may be pardoned for believing that it is reliable. I have, therefore, retained the whole of my former text, unchanged, excepting in a very few matters of mere style, and have incorporated the two volumes of the original work in the first volume of the present history. A full and minute index was added to the second volume of the former work. This I have repeated at the end of the first volume of the new work, and have made a new index for the second volume. It seemed to me that this would be more convenient to readers than it would be to incorporate the former index with the new one.

It may be well to explain what I understand to be the distinction between Constitutional History and Constitutional Law. As I use these terms I include in Constitutional History those events and that public action which have shaped the text of a written Constitution, or which should be regarded in its interpretation. Constitutional Law is that body of jurisprudence which includes the text of the Constitution and the constructions which it has received from those whose public duty it has been from time to time to interpret its meaning and application. But the terms Constitutional History and Constitutional Law have in this country a signification peculiar to ourselves. In other countries, as, for example, in England, where there is no written Constitution, and where everything depends upon the will of the legislative power, Constitutional History is the history of the legislation or public action which has given form and fixture to the powers of the government and the rights of individuals; and there, too, Constitutional Law is the existing system of public and private rights, which remain as they are until Parliament, consisting of the two Houses of the legislature, and the sovereign in her or his legislative capacity, see fit to change them.

With us, the bearing of Constitutional history upon any doctrine or proposition of Constitutional Law consists in the influence which public events or public action ought to have on the interpretation of a written text. First in importance stand the proceedings which attended the formation and adoption of the Constitution. These are described in the first volume of the present history. Next in importance come the interpretations which were put upon the text by the legislative department which was first charged with the duty of enacting the organic laws necessary to put the government in execution; the interpretations made by the executive, during Washington's administration; together with the amendments proposed by the First Congress, and adopted by the states in 1789-1791. All of this Constitutional History, which I have endeavored to embody in the second volume of the present work, preceded what I may call the era of judicial interpretation; by which I mean the earlier interpretations given to the Constitution by the Judiciary. Next in rank of importance are the later interpretations of all the three departments of the government.

The reasons why the first constructions and applications of the Constitution are of superior importance, is because those who first had to administer the new government belonged to the generation which framed and established it, and especially because many of them were actively engaged in framing and establishing, or in opposing and amending it. I have endeavored to keep distinct what occurred before the Civil War, and what happened afterwards, so as to explain the trying period when further amendments were made necessary, or were believed to be so. I have included in this later exposition those judicial constructions only which have related to the amendments, the history of which has been described, and a few of those which grew out of the Civil War or the measures that were adopted in its prosecution. These explanations will show why, in writing the second volume of the present history, I have not followed a strictly chronological order. By this I do not mean that time has been disregarded. The time or times when public events or public action have affected the Constitutional *status* of the country are of the utmost consequence; and in a work designed to exhibit the influence of public

events and public action upon the shape and meaning of a written Constitution, dates and contemporaneous occurrences are to be carefully noted. But I have deemed it best to group the subjects on which I have written, and have not attempted a narrative such as is usually found in general histories of a country, in which the reigns of different princes or the succession of different dynasties have followed each other. Ours is one dynasty, one reign, one national continuity, one unbroken national existence, under the Constitution established in 1788. The continuity of our national existence might have been broken, and was in imminent danger of being broken, between 1860 and 1865. But happily that danger was averted. We have settled the one perilous question that threatened our happiness and the permanency of our system of government. It remains for us to enjoy what we have preserved. A retrospect of the causes and events which made our Constitution a subject of altercation rather than enjoyment is now useful, not for the renewal of controversies, but for an enlightened perception of their nature and of the truths in which they have terminated. History is valuable for the warnings or the instructions which the past gives to the present and the future; and every stage of our Constitutional history is marked by such warnings and such instructions.

Gibbon, when announcing the continuation of his "History of the Decline and Fall of the Roman Empire," said, "An author easily persuades himself that the public opinion is still favorable to his labors." Although a full generation has passed since I published my original work, I have had no reason to believe that the public has forgotten me. I have had many inquiries for the reasons why I have so long permitted it to remain out of print. These reasons I have now assigned. Since my purpose to reproduce it and to continue it to a later period has been made known, encouragement to proceed has reached me from many persons whose encouragement is most important. I have been informed by those who ought to know that in our higher schools of learning there is an awakened interest in American Constitutional history; that the young men of the present day are seeking for information on this subject much more than those who immediately

preceded them. Among those who are already on the active stage of life, I can observe the same tendency.

Perhaps some future Gibbon, centuries hence, will write the Decline and Fall of the American Republic. Let us hope, however, that in the meantime something will have been done for the welfare of mankind; that some still greater improvements will have been made in the science of government; and that if the decadence of our institutions must be recorded, the way will have been prepared for better ones to take their place.

NEW YORK, *January*, 1889.





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# CONSTITUTIONAL HISTORY

OF

## THE UNITED STATES.

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### CHAPTER I.

1774-1775.

#### ORGANIZATION OF THE FIRST CONTINENTAL CONGRESS.—ORIGIN OF THE UNION.

THE thirteen British colonies in North America, by whose inhabitants the American Revolution was achieved, were, at the commencement of that struggle, so many separate communities, having, to a considerable extent, different political organizations and different municipal laws; but their various populations spoke almost universally the English language. These colonies were Virginia, Massachusetts, New Hampshire, Connecticut, Rhode Island, Maryland, New York, New Jersey, Pennsylvania, Delaware, North Carolina, South Carolina, and Georgia. From the times when they were respectively settled, until the union formed under the necessities of a common cause at the breaking out of the Revolution, they had no political connection; but each possessed a domestic government peculiar to itself, derived directly from the crown of England, and more or less under the direct control of the mother country.

The political organizations of the colonies have been classed by jurists and historians under the three heads of Provincial, Proprietary, and Charter governments.

I.—1



To the class of Provincial governments belonged the provinces of New Hampshire, New York, New Jersey, Virginia, the two Carolinas, and Georgia. These had no other written constitutions, or fundamental laws, than the commissions issued to the governors appointed by the crown, explained by the instructions which accompanied them. The governor, by his commission, was made the representative or deputy of the king, and was obliged to act in conformity with the royal instructions. He was assisted by a council, the members of which, besides participating with him, to a certain extent, in the executive functions of the government, constituted the upper house of the provincial legislature; and he was also authorized to summon a general assembly of representatives of the freeholders of the province. The three branches thus convened, consisting of the governor, the council, and the representatives, constituted the provincial assemblies, having the power of local legislation, subject to the ratification or disapproval of the crown. The direct control of the crown over these provincial governments may also be traced in the features, common to them all, by which the governor had power to suspend the members of the council from office, and, whenever vacancies occurred, to appoint to those vacancies, until the pleasure of the crown should be known; to negative all the proceedings of the assembly, and to prorogue or dissolve it at his pleasure.

The Proprietary governments, consisting of Maryland, Pennsylvania, and Delaware, were those in which subordinate powers of legislation and government had been granted to certain individuals called the proprietaries, who appointed the governor and authorized him to summon legislative assemblies. The authority of the proprietaries, or of the legislative bodies assembled by the governor, was restrained by the condition that the ends for which the grant was made to them by the crown should be substantially pursued in their legislation, and that nothing should be done, or attempted, which might derogate from the sovereignty of the mother country. In Maryland, the laws enacted by the proprietary government were not subject to the direct control of the crown; but in Pennsylvania and Delaware they were.<sup>1</sup>

The Charter governments, consisting, at the period of the Revo-

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<sup>1</sup> Story's Commentaries on the Constitution, § 160.

lution, of Massachusetts, Rhode Island, and Connecticut, may be said, in a stricter sense; to have possessed written constitutions for their general political government. The charters, granted by the crown, established an organization of the different departments of government similar to that in the provincial governments. In Massachusetts, after the charter of William and Mary, granted in 1691, the governor was appointed by the crown; the council were chosen annually by the General Assembly, and the House of Representatives by the people. In Connecticut and Rhode Island, the governor, council, and representatives were chosen annually by the freemen of the colony. In the charter, as well as the provincial governments, the general power of legislation was restrained by the condition that the laws enacted should be, as nearly as possible, agreeable to the laws and statutes of England.

One of the principal causes which precipitated the war of the Revolution was the blow struck by Parliament at these charter governments, commencing with that of Massachusetts, by an act intended to alter the constitution of that province as it stood upon the charter of William and Mary; a precedent which justly alarmed the entire continent, and in its principle affected all the colonies, since it assumed that none of them possessed constitutional rights which could not be altered or taken away by an act of Parliament. The "Act for the better regulating of the government of the Province of Massachusetts Bay," passed in 1774, was designed to create an executive power of a totally different character from that created by the charter, and also to remodel the judiciary, in order that the laws of the imperial government might be more certainly enforced.

The Massachusetts charter had reserved to the king the appointment of the governor, lieutenant-governor, and secretary of the province. It vested in the General Assembly the choice of twenty-eight councillors, subject to rejection by the governor; it gave to the governor, with the advice and consent of the council, the appointment of all military and judicial officers, and to the two houses of the legislature the appointment of all other civil officers, with a right of negative by the governor. The new law vested the appointment of councillors, judges, and magistrates of all kinds, in the crown, and in some cases in the governor, and

made them all removable at the pleasure of the crown. A change so radical as this, in the constitution of a people long accustomed to regard their charter as a compact between themselves and the crown, could not but lead to the most serious consequences.

The statements which have now been made are sufficient to remind the reader of the important fact that, at the commencement of the Revolution, there existed, and had long existed, in all the colonies, local legislatures, one branch of which was composed of representatives chosen directly by the people, accustomed to the transaction of public business, and being in fact the real organs of the popular will. These bodies, by virtue of their relation to the people, were, in many instances, the bodies which took the initiatory steps for the organization of the first national or Continental Congress, when it became necessary for the colonies to unite in the common purpose of resistance to the mother country. But it should be again stated, before we attend to the steps thus taken, that the colonies had no direct political connection with each other before the Revolution commenced, but that each was a distinct community, with its own separate political organization, and without any power of legislation for any but its own inhabitants; that, as political communities, and upon the principles of their organizations, they possessed no power of forming any union among themselves, for any purpose whatever, without the sanction of the crown or Parliament of England.<sup>1</sup> But the

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<sup>1</sup> That a union of the colonies into one general government, for any purpose, could not take place without the sanction of Parliament, was always assumed in both countries. The sole instance in which a plan of union was publicly proposed and acted upon, before the Revolution, was in 1753-4, when the Board of Trade sent instructions to the Governor of New York to make a treaty with the Six Nations of Indians; and the other colonies were also instructed to send commissioners to be present at the meeting, so that all the provinces might be comprised in one general treaty, to be made in the king's name. It was also recommended by the home government, that the commissioners at this meeting should form a plan of union among the colonies for their mutual protection and defence against the French. Twenty-five commissioners assembled at Albany in May, 1754, from New Hampshire, Massachusetts, Rhode Island, Connecticut, New York, Pennsylvania, and Maryland. In this body, a plan of union was digested and adopted, which was chiefly the work of Dr. Franklin. It was agreed that an act of Parliament was necessary to authorize it to be carried into

free and independent power of forming a union among themselves, for objects and purposes common to them all, which was denied to their colonial condition by the principles of the English Constitution, was one of the chief powers asserted and developed by the Revolution; and they were enabled to effect this union, as a revolutionary right and measure, by the fortunate circumstances of their origin, which made the people of the different colonies, in several important senses, one people. They were, in the first place, chiefly the descendants of Englishmen, governed by the laws, inheriting the blood, and speaking the language of the people of England. As British subjects, they had enjoyed the right of dwelling in any of the colonies, without restraint, and of carrying on trade from one colony to another, under the regulation of the general laws of the empire, without restriction by colonial legislation. They had, moreover, common grievances to be redressed, and a common independence to establish, if redress could not be obtained; for although the precise grounds of dispute with the crown or the Parliament of England had not always been the same in all the colonies, yet when the Revolution actually broke

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effect. It was rejected by all the colonial assemblies before which it was brought, and in England it was not thought proper by the Board of Trade to recommend it to the king. In America it was considered to have too much of *prerogative* in it, and in England to be too *democratic*. It was a comprehensive scheme of government, to consist of a governor-general, or president-general, who was to be appointed and supported by the crown, and a grand council, which was to consist of one member chosen by each of the smaller colonies, and two or more by each of the larger. Its duties and powers related chiefly to defence against external attacks. It was to have a general treasury, to be supplied by an excise on certain articles of consumption. See the history and details of the scheme, in Sparks's *Life and Works of Franklin*, I. 176, III. 22-55; Hutchinson's *History of Massachusetts*, III. 23; Trumbull's *History of Connecticut*, II. 355; Pitkin's *History of the United States*, I. 140-146. In 1788, Franklin said of it: "The different and contradictory reasons of dislike to my plan make me suspect that it was really the true medium; and I am still of opinion it would have been happy for both sides, if it had been adopted. The colonies so united would have been sufficiently strong to have defended themselves; there would have been no need of troops from England; of course the subsequent pretext for taxing America, and the bloody contest it occasioned, would have been avoided. But such mistakes are not new; history is full of the errors of states and princes." (*Life of Franklin*, by Sparks, I. 178.) We may not join in his regrets now.

out, they all stood in the same attitude of resistance to the same oppressor, making common cause with each other, and resting upon certain great principles of liberty, which had been violated with regard to many of them, and with the further violation of which all were threatened.

It was while the controversies between the mother country and the colonies were drawing towards a crisis that Dr. Franklin, then in England as the political agent of Pennsylvania, of Massachusetts, and of Georgia, in an official letter to the Massachusetts Assembly, dated July 7th, 1773, recommended the assembling of a general congress of all the colonies. "As the strength of an empire," said he, "depends not only on the *union* of its parts, but on their readiness for united exertion of their common force; and as the discussion of rights may seem unseasonable in the commencement of actual war, and the delay it might occasion be prejudicial to the common welfare; as likewise the refusal of one or a few colonies would not be so much regarded, if the others granted liberally, which perhaps by various artifices and motives they might be prevailed on to do; and as this want of concert would defeat the expectation of general redress, that might otherwise be justly formed; perhaps it would be best and fairest for the colonies, in a general congress now in peace to be assembled, or by means of the correspondence lately proposed, after a full and solemn assertion and declaration of their rights, to engage firmly with each other that they will never grant aids to the crown in any general war till those rights are recognized by the king and both houses of Parliament; communicating at the same time to the crown this their resolution. Such a step I imagine will bring the dispute to a crisis."<sup>1</sup>

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<sup>1</sup> It is not certain by whom the first suggestion of a Continental Congress was made. Thomas Cushing, Speaker of the Massachusetts Assembly, and a correspondent of Dr. Franklin, appears to have expressed to him the opinion, previously to the date of Franklin's official letter quoted in the text, that a congress would grow out of the committees of correspondence which had been recommended by the Virginia House of Burgesses. But Mr. Sparks thinks that no other direct and public recommendation of the measure can be found before the date of Franklin's letter to the Massachusetts Assembly. Sparks's *Life of Franklin*, I. 350, note. In the early part of the year 1774 the necessity of such

The first actual step towards this measure was taken in Virginia. A new House of Burgesses had been summoned by the royal governor to meet in May, 1774. Soon after the members had assembled at Williamsburg they received the news that, by an act of Parliament, the port of Boston was to be closed on the first day of the succeeding June, and that other disabilities were to be inflicted on that town. They immediately passed an order, setting apart the first day of June as a day of fasting, humiliation, and prayer, "to implore the Divine interposition for averting the heavy calamity which threatened destruction to their civil rights and the evils of civil war, and to give them one heart and one mind firmly to oppose, by all just and proper means, every injury to American rights." Thereupon the governor dissolved the House. But the members immediately assembled at another place of meeting, and, having organized themselves as a committee, drew up and subscribed an association, in which they declared that the interests of all the colonies were equally concerned in the late doings of Parliament, and advised the local Committee of Correspondence to consult with the committees of the other colonies on the expediency of holding a general Continental Congress. Pursuant to these recommendations, a popular convention was held at Williamsburg, on the 1st of August, which appointed seven persons as delegates to represent the people of Virginia in a general Congress to be held at Philadelphia in the September following.<sup>1</sup>

The Massachusetts Assembly met on the last of May, and, after negating thirteen of the councillors, Governor Gage adjourned the assembly to meet at Salem on the 7th of June. When they came together at that place the House of Representatives passed a resolve, declaring a meeting of committees from the several colonies on the continent to be highly expedient and necessary, to deliberate and determine upon proper measures to be recommended to all the colonies for the recovery and establishment of their just

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a congress began to be popularly felt throughout all the colonies. Sparks's Washington, II. 326.

<sup>1</sup> These delegates were Peyton Randolph, Richard Henry Lee, George Washington, Patrick Henry, Richard Bland, Benjamin Harrison, and Edmund Pendleton.

rights and liberties, civil and religious, and for the restoration of union and harmony with Great Britain. They then appointed five delegates<sup>1</sup> to meet the representatives of the other colonies in congress at Philadelphia in the succeeding September.

These examples were at once followed by the other colonies. In some of them the delegates to the Continental Congress were appointed by the popular branch of the legislature, acting for and in behalf of the people; in others they were appointed by conventions of the people called for the express purpose, or by committees duly authorized to make the appointment.<sup>2</sup> The Congress, styling themselves "the delegates appointed by the good people of these colonies," assembled at Philadelphia on the 5th of September, 1774, and organized themselves as a deliberative body by the choice of officers and the adoption of rules of proceeding. Peyton Randolph, of Virginia, was elected President, and Charles Thompson, of Pennsylvania, Secretary, of the Congress.

No precedent existed for the mode of action to be adopted by

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<sup>1</sup> Thomas Cushing, Samuel Adams, Robert Treat Paine, James Bowdoin, and John Adams.

<sup>2</sup> The delegates in the Congress of 1774 from New Hampshire were appointed by a Convention of Deputies chosen by the towns, and received their credentials from that convention. In Rhode Island they were appointed by the General Assembly and commissioned by the governor. In Connecticut they were appointed and instructed by the Committee of Correspondence for the Colony, acting under authority conferred by the House of Representatives. In New York the mode of appointment was various. In the city and county of New York the delegates were elected by popular vote taken in seven wards. The same persons were also appointed to act for the counties of West Chester, Albany, and Dutchess, by the respective committees of those counties; and another person was appointed in the same manner for the county of Suffolk. The New York delegates received no other instructions than those implied in the certificates, "to attend the Congress and to represent" the county designated. In New Jersey the delegates were appointed by the committees of counties, and were simply instructed "to represent" the colony. In Pennsylvania they were appointed and instructed by the House of Assembly. In the counties of New Castle, Kent, and Sussex-on-Delaware delegates were elected by a convention of the freemen assembled in pursuance of circular letters from the Speaker of the House of Assembly. In Maryland the appointment was by committees of the counties. In Virginia it was by a popular convention of the whole colony. In South Carolina it was by the House of Commons. Georgia was not represented in this Congress.

this assembly. There was, therefore, at the outset, no established principle which might determine the nature of the union; but that union was to be shaped by the new circumstances and relations in which the Congress found itself placed. There had been no general concert among the different colonies as to the numbers of delegates, or, as they were called in many of the proceedings, "committees" of the colonies, to be sent to the meeting at Philadelphia. On the first day of their assembling Pennsylvania and Virginia had each six delegates in attendance; New York had five; Massachusetts, New Jersey, and South Carolina had four each; Connecticut had three; New Hampshire, Rhode Island, Delaware, and Maryland had two each. The delegates from North Carolina did not arrive until the 14th.<sup>1</sup>

As soon as the choice of officers had taken place,<sup>2</sup> the method of voting presented itself as the first thing to be determined; and the difficulties arising from the inequalities between the colonies in respect to actual representation, population, and wealth, had to be encountered upon the threshold. Insurmountable obstacles stood in the way of the adoption of interests as the basis of votes. The weight of a colony could not be ascertained by the numbers of its inhabitants, the amount of their wealth, the extent of their trade, or by any ratio to be compounded of all these elements, for no authentic evidence existed from which such data could be taken.<sup>3</sup> As it was apparent, however, that some colonies had a larger proportion of members present than others, relatively to their size and importance, it was thought to be equally objectionable to adopt the method of voting by polls. In these circumstances the opinion was advanced that the colonial governments were at an end; that all America was thrown into one mass, and was in a state of nature; and, consequently, that the people ought to be considered as represented in the Congress according to their numbers, by the delegations actually present.<sup>4</sup> Upon this principle the voting should have been by polls.

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<sup>1</sup> Journals, I. 1, 12.

<sup>2</sup> The president and secretary appear to have been chosen *à la voce*, or by a hand vote. John Adams's Works, II. 365.

<sup>3</sup> Adams, II. 366.

<sup>4</sup> This opinion, we are told by Mr. Adams, was advanced by Patrick Henry. See notes of the debate, in Adams, II. 366, 368.



But neither the circumstances under which they were assembled, nor the dispositions of the members, permitted an adoption of the theory that all government was at an end, or that the boundaries of the colonies were effaced. The Congress had not assembled as the representatives of a people in a state of nature, but as the committees of different colonies, which had not yet severed themselves from the parent state. They had been clothed with no legislative or coercive authority, even of a revolutionary nature; compliance with their resolves would follow only on conviction of the utility of their measures; and all their resolves and all their measures were, by the express terms of many of their credentials, limited to the restoration of union and harmony with Great Britain, which would of course leave the colonies in their colonial state. The people of the continent, therefore, as a people in the state of nature, or even in a national existence as one people standing in a revolutionary attitude, had not then come into being.

The nature of the questions, too, which they were to discuss, and of the measures which they were to adopt, were to be considered in determining by what method of voting those questions and measures should be decided. The Congress had been called to secure the *rights* of the colonies. What were those rights? By what standard were they to be ascertained? By the law of nature, or by the principles of the English Constitution, or by the charters and fundamental laws of the colonies, regarded as compacts between the crown and the people, or by all of these combined? If the law of nature alone was to determine their rights, then all allegiance to the British crown was to be regarded as at an end. If the principles of the English Constitution, or the charters, were to be the standard, the law of nature must be excluded from consideration. This exclusion would of necessity narrow the ground, and deprive them of a resource to which Parliament might at last compel them to look.<sup>1</sup> In order, therefore, to leave the whole field open for consideration, and at the same time to avoid committing themselves to principles irreconcilable with the preservation of allegiance and their colonial relation to Great Britain,

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<sup>1</sup> See the very interesting notes of their debates in Adams's Works, II. 366, 370-377.

it was necessary to consider themselves as an assembly of committees from the different colonies, in which each colony should have one voice, through the delegates whom it had sent to represent and act for it. But, as if foreseeing the time when population would become of necessity the basis of congressional power, when the authority of Parliament would have given place to a system of American continental legislation, they inserted, in the resolve determining that each colony should have one vote, a caution that would prevent its being drawn into precedent. They declared, as the reason for the course which they adopted, that the Congress were not possessed of, or able to procure, the proper materials for ascertaining the importance of each colony.<sup>1</sup>

It appears, therefore, very clear that an examination of the relations of the first Congress to the colonies which instituted it will not enable us to assign to it the character of a government. Its members were not elected for the express purpose of making a revolution. It was an assembly convened from separate colonies, each of which had causes of complaint against the imperial government to which it acknowledged its allegiance to be due, and each of which regarded it as essential to its own interests to make common cause with the others, for the purpose of obtaining redress of its own grievances. The idea of separating themselves from the mother country had not been generally entertained by the people of any of the colonies. All their public proceedings, from the commencement of the disputes down to the election of delegates to the first Congress, including the instructions given to those delegates, prove, as we have seen, that they looked for redress and relief to means which they regarded as entirely consistent with the principles of the British Constitution.<sup>2</sup>

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<sup>1</sup> Journals, I. 10.

<sup>2</sup> The instructions embraced in the credentials of the delegates to the first Congress were as follows: NEW HAMPSHIRE—"to devise, consult, and adopt such measures as may have the most likely tendency to extricate the colonies from their present difficulties; to secure and perpetuate their rights, liberties, and privileges; and to restore that peace, harmony, and mutual confidence which once happily subsisted between the parent country and her colonies." MASSACHUSETTS—"to deliberate and determine upon wise and proper measures, to be by them recommended to all the colonies, for the recovery and establishment of their just rights and liberties, civil and religious, and the restoration

Still, although this Congress did not take upon themselves the functions of a government, or propose revolution as a remedy for the wrongs of their constituents, they regarded and styled themselves as "the guardians of the rights and liberties of the colonies;"<sup>1</sup> and in that capacity they proceeded to declare the causes of complaint, and to take the necessary steps to obtain redress, in what they believed to be a constitutional mode. These steps, however, although not directly revolutionary, had a revolutionary tendency.

On the 6th of September, 1774, a resolve was passed, that a committee be appointed to state the rights of the colonies in general, the several instances in which those rights had been violated or infringed, and the means most proper to be pursued for obtaining a restoration of them. Another committee was ordered on

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of union and harmony between Great Britain and the colonies, most ardently desired by all good men." RHODE ISLAND—"to meet and join with the other commissioners or delegates from the other colonies in consulting upon proper measures to obtain a repeal of the several acts of the British Parliament for levying taxes upon his majesty's subjects in America without their consent, and particularly the commercial connection of the colonies with the mother country, for the relief of Boston and the preservation of American liberty." VIRGINIA—"to consider of the most proper and effectual manner of so operating on the commercial connection of the colonies with the mother country as to procure redress for the much injured Province of Massachusetts Bay, to secure British America from the ravage and ruin of arbitrary taxes, and speedily to procure the return of that harmony and union so beneficial to the whole empire, and so ardently desired by all British America." SOUTH CAROLINA—"to consider the acts lately passed and bills depending in Parliament with regard to the port of Boston and Colony of Massachusetts Bay, which acts and bills, in the precedent and consequences, affect the whole continent of America; also the grievances under which America labors by reason of the several acts of Parliament that impose taxes or duties for raising a revenue, and lay unnecessary restraints and burdens on trade; and of the statutes, parliamentary acts, and royal instructions, which make an invidious distinction between his majesty's subjects in Great Britain and America; with full power and authority to concert, agree to, and effectually prosecute such legal measures as, in the opinion of the said deputies and of the deputies so to be assembled, shall be most likely to obtain a repeal of the said acts and a redress of these grievances." The delegates from New York and New Jersey were simply instructed "to represent" those colonies in the Congress. Journals, I. 2-9.

<sup>1</sup> Letter of the Congress to Governor Gage, October 10, 1774; Journals, I. 25, 26.

the same day, to examine and report the several statutes affecting the trade and manufactures of the colonies. On the following day, it was ordered that the first committee should consist of two members, and the second of one member, from each of the colonies.<sup>1</sup> Two questions presented themselves to the first of these committees, and created a good deal of embarrassment. The first was, whether, in stating the rights of the colonies, they should recur to the law of nature, as well as to the British Constitution and the American charters and grants. The second question related to the authority which they should allow to be in Parliament; whether they should deny it wholly, or deny it only as to internal affairs, admitting it as to external trade; and if the latter, to what extent and with what restrictions. It was soon felt that this question of the authority of Parliament was the essence of the whole controversy. Some denied it altogether. Others denied it as to every species of taxation; while others admitted it to extend to the regulation of external trade, but denied it as to all internal affairs. The discussions had not proceeded far, before it was perceived that this subject of the regulation of trade might lead directly to the question of the continuance of the colonial relations with the mother country. For this they were not prepared. It was apparent that the right of regulating the trade of the whole country, from the local circumstances of the colonies and their disconnection with each other, could not be exercised by the colonies themselves: it was thought that the aid, assistance, and protection of the mother country were necessary to them; and therefore, as a proper equivalent, that the colonies must admit the right of regulating the trade, to some extent and in some mode, to be in Parliament. The alternatives were, either to set up an American legislature, that could control and regulate the trade of the whole country, or else to give the power to Parliament. The Congress determined to do the latter; supposing that they could limit the admission, by denying that the power extended to taxation, but ceding at the same time the right to regulate the external trade of the colonies for the common benefit of the whole empire.<sup>2</sup> They grounded this concession upon "the necessities of the case," and "the mutual interests of

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<sup>1</sup> Additions were made to it.

<sup>2</sup> Works of John Adams.

both countries ;”<sup>1</sup> meaning by these expressions to assert that all legislative control over the external and internal trade of the colonies belonged of right to the colonies themselves, but, as they were part of an empire for which Parliament legislated, it was necessary that the common legislature of the whole empire should retain the regulation of the external trade, excluding all power of taxation for purposes of revenue, in order to secure the benefits of the trade of the whole empire to the mother country.

The Congress, therefore, after having determined to confine their statement to such rights as had been infringed by acts of Parliament since the year 1763, unanimously adopted a Declaration of Rights, in which they summed up the grievances and asserted the rights of the colonies. This document placed the rights of the colonies upon the laws of nature, the principles of the English Constitution, and the several charters or compacts. It declared that, as the colonies were not, and from their local situation could not be, represented in the English Parliament, they were entitled to a free and exclusive power of legislation in their several provincial legislatures, where their right of representation could alone be preserved, in all cases of taxation and internal polity, subject only to the negative of their sovereign, in such manner as had been before accustomed. At the same time, from the necessity of the case and from a regard to the mutual interests of both countries, they cheerfully consented to the operation of such acts of Parliament as were in good faith limited to the regulation of their external commerce, for the purpose of securing the commercial advantages of the whole to the mother country, and the commercial benefit of its respective members ; excluding every idea of taxation, internal and external, for raising a revenue on the subjects in America, without their consent.\*

In addition to this, they asserted, as great constitutional rights inherent in the people of all these colonies, that they were entitled to all the rights, liberties, and immunities of free and natural-born subjects within the realm of England ; to the common law of England, and especially to trial by a jury of the vicinage ; to the

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<sup>1</sup> See the origin of these expressions explained, in Adams's Works, II. 373-375.

\* Journals, I. 29.

immunities and privileges granted and confirmed to them by royal charters, or secured by their several codes of provincial laws; and to the right of peaceably assembling to consider grievances and to petition the king.<sup>1</sup>

In order to enforce their complaints upon the attention of the government and people of Great Britain, and as the sole means which were open to them, short of actual revolution, of coercing the ministry into a change of measures, they resolved that after the 10th of September, 1775, the exportation of all merchandise, and every commodity whatsoever, to Great Britain, Ireland, and the West Indies, ought to cease, unless the grievances of America should be redressed before that time; and that after the first day of December, 1774, there should be no importation into British America, from Great Britain or Ireland, of any goods, wares, or merchandise whatever, or from any other place, of any such goods, wares, or merchandise as had been exported from Great Britain or Ireland, and that no such goods, wares, or merchandise be used or purchased.<sup>2</sup> They then prepared an association, or agreement, of non-importation, non-exportation, and non-consumption, in order, as far as lay in their power, to cause a general compliance with their resolves. This association was subscribed by every member of the Congress, and was by them recommended for adoption to the people of the colonies, and was very generally adopted and acted upon.<sup>3</sup> They resorted to this as the most speedy, effectual, and peaceable measure to obtain a redress of the grievances of which the colonies complained; and they entered into the agreement on behalf of the inhabitants of the several colonies for which they acted.

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<sup>1</sup> Journals, I. 29. They adopted also an Address to the People of Great Britain, and a Petition to the King, embodying similar principles with those asserted in the Declaration of Rights. Ibid. 38, 67.

<sup>2</sup> Journals, I. 21.

<sup>3</sup> This association, signed by the delegates of Maryland, Virginia, North Carolina, and South Carolina, as well as of the other colonies, contained, among other things, the following agreement: "We will neither import nor purchase any slaves imported after the first day of December next; after which time we will wholly discontinue the slave-trade, and will neither be concerned in it ourselves, nor will we hire our vessels, nor sell our commodities or manufactures, to those who are concerned in it." Journals, I. 33.

This Congress, which sat from the 5th of September to the 26th of October, 1774, had thus made the restoration of commercial intercourse between the colonies and other parts of the British empire to depend upon the repeal by Parliament of the obnoxious measures of which they complained, and upon the recognition of the rights which they asserted; for although their acts had not the foundation of laws, the general adoption of their recommendations throughout the colonies gave them a power that laws rarely possess. Before they adjourned, they recommended that another Congress of all the colonies should be held at Philadelphia on the 10th of the following May, unless their grievances were redressed before that time, and that the deputies to such new Congress should be chosen immediately.<sup>1</sup>

But while the Continental Congress were engaged in the adoption of these measures of constitutional resistance, and still acknowledged their colonial relations to the imperial government, the course of events in Massachusetts had put an end to the forms of law and government in that colony, as established or upheld by imperial authority. This assembly, the last to be held in the province upon the principles of the charter, had been dissolved by the governor's proclamation, at Salem, on the 17th of June, 1774. The new law for the alteration of the government had taken effect; and in August the governor received from England a list of thirty-six councillors, who were to be called into office by the king's writ of *mandamus*, instead of being elected, as under the charter, by the House of Representatives. Two thirds of the number accepted their appointment; but popular indignation, treating them as enemies of their country, compelled the greater part of them to renounce their offices. The new judges were prevented everywhere from proceeding with the business of the courts, which were obstructed by assemblies of the people, who would permit no judge to exercise his functions, save in accordance with the ancient laws and usages of the colony.

Writs had been issued for a new General Assembly, which was to meet at Salem in October; but it was found that, while the old constitution had been taken away by act of Parliament, the new one had been rejected by the people. The compulsory resig-

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<sup>1</sup> Journals, I. 56. Oct. 22, 1774.

nation of so many of the councillors left that body without power, and the governor deemed it expedient to countermand the writs by proclamation, and to defer the holding of the assembly until the popular temper should have had time to cool. But the legality of the proclamation was denied; the elections were everywhere held, and the members elect assembled at Salem, pursuant to the precepts. There they waited a day for the governor to attend, administer the oaths, and open the session; but as he did not appear, they resolved themselves into a Provincial Congress, to be joined by others who had been or might be elected for that purpose, and adjourned to the town of Cambridge, to take into consideration the affairs of the colony, in which the regular and established government was now at an end. Their acts were at first couched in the form of recommendations to the people, whose ready compliance gave to them the weight and efficacy of laws, and there was thus formed something like a new and independent government. Under the form of recommendation and advice, they settled the militia, regulated the public revenue, provided arms, and prepared to resist the British troops. In December, 1774, they elected five persons to represent the colony in the Continental Congress that was to assemble at Philadelphia in the ensuing May. They were met by a proclamation, issued by the governor, in which their assembly was declared unlawful, and the people were prohibited, in the king's name, from complying with their recommendations, requisitions, or resolves. Through the winter, the governor held the town of Boston, with a considerable body of royal troops, but the rest of the province generally yielded obedience to the Provincial Congress. In this posture of affairs, the encounter between a detachment of the king's forces and a body of militia, commonly called the battle of Lexington, occurred on the 19th of April, 1775.



## CHAPTER II.

1775-1776.

THE SECOND CONTINENTAL CONGRESS.—FORMATION AND CHARACTER OF THE REVOLUTIONARY GOVERNMENT.—APPOINTMENT OF A COMMANDER-IN-CHIEF.—FIRST ARMY OF THE REVOLUTION.

A NEW Continental Congress assembled at Philadelphia on the 10th of May, 1775; and in order to observe the growth of the Union, it is necessary to trace the organization of this body, and to describe briefly the kind of authority which it exercised, from the time of its assembling until the adoption and promulgation of the Declaration of Independence.<sup>1</sup>

The delegates to this Congress were chosen partly by the popular branch of such of the colonial legislatures as were in session at the time, the choice being afterwards ratified by conventions of the people; but they were principally appointed by conventions of the people held in the various colonies. All these appointments, except those made in New York, took place before the affair at Lexington, and most of them had been made in the

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<sup>1</sup> Peyton Randolph, President of the first and re-elected President of the second Congress, died very suddenly at Philadelphia on the 22d of October, 1775, and was succeeded in that office by John Hancock. Mr. Randolph was one of the most eminent of the Virginia patriots, and an intimate friend of Washington. Richard Henry Lee wrote to Washington, on the day after his death, that "in him American liberty lost a powerful advocate, and human nature a sincere friend." He was formerly Attorney-General of Virginia, and in 1753 went to England as agent of the House of Burgesses, to procure the abolition of a fee, known as the pistole fee, which it had been the custom of the governors of Virginia to charge for signing land patents, as a perquisite of their office. He succeeded in getting the fee abolished in cases where the quantity of land exceeded one hundred acres. He was commander of a company of mounted volunteers called the Gentlemen Associators, who served in the French war. He was President of the Virginia Convention, as well as a delegate in Congress, at the time of his death. Sparks's Washington, II. 58, 161; III. 139, 140; XII. 420.

course of the previous winter.<sup>1</sup> The credentials of the delegates, therefore, while they conferred authority to adopt measures to recover and establish American rights, still expressed, in many instances, a desire for the restoration of harmony between Great Britain and her colonies. In some cases, however, this desire was not expressed, but a naked authority was granted, to consent and agree to all such measures as the Congress should deem necessary and effectual to obtain a redress of American grievances.

When this Congress assembled, it seems to have been tacitly assumed that each colony should continue to have one vote through its delegation actually present. All the thirteen colonies were represented at the opening of the session, except Georgia and Rhode Island. Three days after the session commenced, a delegate appeared from the Parish of St. Johns in Georgia, who was admitted to a seat, but did not claim the right of voting for the colony. On the 15th of May, a delegation from Rhode Island appeared and took their seats.

The credentials of the delegates contained no limitation of their powers with respect to time, with the exception of those from Massachusetts and South Carolina, whose authority was not to extend beyond the end of the year. The Congress continued in session until the 1st of August, and then adjourned for a recess to the 5th of September. When they were again assembled, the delegations of several of the colonies were renewed, with different limitations as to their time of service. Georgia sent a full delegation, who took their seats on the 13th of September. Still later, the delegations of several other colonies were renewed from time to time, and this practice was pursued both before and after the Declaration of Independence, thus rendering the Congress a permanent body.<sup>2</sup>

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<sup>1</sup> In Massachusetts, Pennsylvania, and Maryland they were made in December; in Connecticut, in November; in New Jersey, in January; in South Carolina, in February; in the Lower Counties on Delaware and in Virginia, in March; in North Carolina, on the 5th of April; and in New York, on the 22d of April.

<sup>2</sup> Virginia renewed her delegation for one year from the 11th of August, 1775, and Maryland hers with powers to act until the 25th of March, 1776. These new delegations, as well as that of Georgia, appeared on the 18th of September, 1775. On the 16th of September a renewed delegation appeared from New Hampshire, without limitation of time; Connecticut sent a new delegation

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Notwithstanding the absence of any express authority in their instructions to enter upon revolutionary measures, the circumstances under which the Congress assembled placed it in the position and cast upon it the powers of a revolutionary government. Civil war had actually commenced, and blood had been shed. Whether this war was to be carried on for independence, or was only to be waged until the British ministry could be compelled to acknowledge the rights which the colonies had asserted, the Congress necessarily became, at once, the organ of the common resistance of the colonies against the parent state. The first thing which evinces its new relation to the country was the application made to it by the Provincial Congress of Massachusetts, immediately after the engagement at Lexington, for direction and assistance. While they informed the Continental Congress that they had proceeded, at once, to raise a force of thirteen thousand six hundred men, and had made proposals to the other New England colonies to furnish men in the same proportions, stating that the sudden exigency of their affairs precluded the possibility of waiting for direction, they suggested that an American army ought forthwith to be raised for the common cause.<sup>1</sup> In the same manner, the city and county of New York applied for the advice of Congress, how to conduct themselves with regard to the British troops expected in that quarter. These applications caused the Congress at once to resolve itself into a committee of the whole, to take into consideration the state of America.<sup>2</sup>

These proceedings were soon followed by another application on the part of the Provincial Convention of Massachusetts, setting forth the difficulties under which they were laboring for want of a regular form of government; requesting explicit advice respecting the formation of a new government; and offering to submit to such a general plan as the Congress might direct for the colonies, or to endeavor to form such a government for themselves as should not only promote their own advantage, but the union and interest of the whole country.<sup>3</sup>

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on the 16th of January, 1776, and Massachusetts did the same on the 31st of January, for the year 1776. The persons of the delegates were not often changed.

<sup>2</sup> May 15, 1775. Journals, I. 162.

<sup>1</sup> Journals, I. 81, 82.

<sup>3</sup> Journals, I. 112.

Placed in this manner at the head of American affairs, the Continental Congress proceeded, at once, to put the country into a state of defence, and virtually assumed a control over the military operations of all the colonies. They appointed committees to prepare reports on military measures: first, to recommend what posts should be occupied in the city of New York; secondly, to devise ways and means for procuring ammunition and military stores; thirdly, to make an estimate of the moneys necessary to be raised; and fourthly, to prepare rules and regulations for the government of the army.

They then proceeded to create a continental, or national army. To the affair at Lexington had succeeded the investment of Boston, by an army composed of regiments raised by the New England provinces, under the command of General Ward of Massachusetts. This army was adopted by the Congress; and, with other forces raised for the common defence, became known and designated as the American Continental Army.<sup>1</sup> Six companies of riflemen were ordered to be immediately raised in Pennsylvania, two in Maryland, and two in Virginia, and directed to join the army near Boston, and to be paid by the continent.<sup>2</sup>

On the 15th of June, 1775, Colonel George Washington, one of the delegates in Congress from Virginia, was unanimously chosen to be commander-in-chief of the continental forces.<sup>3</sup> Having accepted the appointment, he received from the Congress a commission, together with a resolution by which they pledged their lives and fortunes to maintain, assist, and adhere to him in his great office, and a letter of instructions, in which they charged him to make it his special care "that the liberties of America receive no detriment."<sup>4</sup> In the commission given to the general, the style of "the United Colonies" was for the first time adopted, and the defence of American liberty was assumed as the great object of their union.<sup>5</sup> On the 21st of June, Washington left Philadelphia to take command of the army, and arrived at Cambridge in Massachusetts on the 2d of July. Four major-generals

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<sup>1</sup> Form of enlistment, Journals, I. 118.

<sup>2</sup> Ibid.

<sup>3</sup> See note at end of the chapter.

<sup>4</sup> Secret Journals of Congress, I. 18; Pitkin's History of the United States, I. 334, 335.

<sup>5</sup> Journals, I. 122.

and eight brigadier-generals were also appointed by the Congress for the Continental army; rules and regulations for its government were adopted and proclaimed, and the pay of the officers and privates was fixed.<sup>1</sup>

The Congress also proceeded, as the legislative authority of the United Colonies, to create a continental currency, in order to defray the expenses of the war. This was done by issuing two millions of dollars, in bills of credit, for the redemption of which the faith of the confederated colonies was pledged. A quota of this sum was apportioned to each colony, and each colony was made liable to discharge its proportion of the whole, but the United Colonies were obligated to pay any part which either of the colonies should fail to discharge.<sup>2</sup> The first of these quotas was made payable in four, the second in five, the third in six, and the fourth in seven years from the last day of November, 1775, and the provincial assemblies or conventions were required, by the resolves of the Congress, to provide taxes in their respective provinces or colonies to discharge their several quotas.<sup>3</sup> The Congress also directed reprisals to be made, both by public and private armed vessels, against the ships and goods of the inhabitants of Great Britain found on the high seas, or between high and low water-mark; this being a measure of retaliation against an act of Parliament which had authorized the capture and condemnation of American vessels, and which was considered equivalent to a declaration of war. They also threw open the ports of the United Colonies to all the world, except the dominions and dependencies of Great Britain.

Further, they established a general treasury department, by the appointment of two joint treasurers of the United Colonies, who were required to give bonds for the faithful performance of the duties of their office,<sup>4</sup> and they organized a general post-office, by the appointment of a postmaster-general for the United Colonies, to hold his office at Philadelphia, to appoint deputies, and to establish a line of posts from Falmouth in Massachusetts to

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<sup>1</sup> June 16–July 4, 1775. Journals, L 112–133.

<sup>2</sup> Journals, I. 125, June 23, 1775. Ibid., I. 185, July 29, 1775.      <sup>3</sup> Ibid.

<sup>4</sup> Journals, I. 186, July 29, 1775. Michael Hillegas and George Clymer, Esquires, were elected treasurers.

Savannah in Georgia, with such cross posts as he should judge proper.<sup>1</sup>

The proceedings of the Congress on the subject of the militia were, of course, in the nature of recommendations only. They advised the arming and training of the militia of New York, in May, 1775,<sup>2</sup> and in July they recommended to all the colonies to enroll all the able-bodied, effective men among their inhabitants, between sixteen and fifty years of age, and to form them into proper regiments.<sup>3</sup> The powers of the Congress to call into the field the militia thus embodied were considered to be subject to the consent of those exercising the executive powers of government in the colony, for the time being.<sup>4</sup>

The relations of the country with the Indian tribes and nations were deemed to be properly within the exclusive jurisdiction of the Congress. Three departments of Indian Affairs, northern, southern, and middle, with separate commissioners for each, were therefore established in July, having power to treat with the Indians in the name and on behalf of the United Colonies.<sup>5</sup> Negotiations and treaties were entered into by these departments, and all affairs with the Indians were conducted by them, under the direction and authority of the Congress.<sup>6</sup>

With regard to those inhabitants of the country who adhered to the royalist side of the controversy, the Congress of 1775-6 did not assume and exercise directly the powers of arrest or restraint, but left the exercise of such powers to the provincial assemblies, or conventions, and committees of safety, in the respective colonies, with recommendations from time to time as to the mode in which such powers ought to be exercised.<sup>7</sup>

Besides all this, the different applications made to the Congress by the people of Massachusetts,<sup>8</sup> of New Hampshire,<sup>9</sup> of Virginia,<sup>10</sup> and of South Carolina, concerning the proper exercise of the powers of government in those colonies, and the answers

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<sup>1</sup> Journals, I. 177, 178, July 26, 1775. Dr. Franklin was elected postmaster-general for one year and until another should be appointed by a future Congress.

<sup>2</sup> Journals, I. 106.

<sup>3</sup> Ibid., I. 285.

<sup>4</sup> Ibid., II. 112, 141, 163, 201, 255, 302, 304.

<sup>5</sup> June 9, 1775.

<sup>6</sup> November 3, 1775.

<sup>7</sup> Ibid., I. 170.

<sup>8</sup> Ibid., I. 161, 162.

<sup>9</sup> Ibid., I. 213; II. 5.

<sup>10</sup> December 4, 1775.

to those applications, furnish very important illustrations of the position in which the Congress were placed. To the people of Massachusetts they declared that no obedience was due to the act of Parliament for altering their charter, and that, as the governor and lieutenant-governor would not observe the directions of that instrument, but had endeavored to subvert it, their offices ought to be considered vacant; and, as the council was actually vacant, in order to conform as near as might be to the spirit and substance of the charter, they recommended to the Provincial Convention to write letters to the inhabitants of the several towns entitled to representation in the assembly, requesting them to choose representatives, and requesting the assembly when chosen to elect councillors; adding their wish that these bodies should exercise the powers of government until a governor of the king's appointment would consent to govern the colony according to its charter.<sup>1</sup> The Provincial Conventions of New Hampshire, Virginia, and South Carolina were advised to call a full and free representation of the people, in order to establish such a form of government as, in their judgment, would best promote the happiness of the people and most effectually secure peace and good order in their provinces, during the continuance of the dispute with Great Britain.<sup>2</sup> This advice manifestly contemplated the establishment of provisional governments only.

But between the date of these last proceedings and the following spring a marked change took place, both in the expectations and wishes of the people of most of the colonies, with regard to an accommodation of the great controversy. The last petition of the Congress to the king was refused a hearing in Parliament, as emanating from an unlawful assembly, in arms against their sovereign. In November the town of Falmouth, in Massachusetts, was bombarded and destroyed by the king's cruisers. In the latter part of December an act was passed in Parliament, prohibiting all trade and commerce with the colonies; warranting the capture and condemnation of all American vessels, with their cargoes, and authorizing the commanders of the king's ships to compel the masters, crews, and other persons found in such vessels to enter the king's service. The act also empowered the king to ap-

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<sup>1</sup> Journals, I. 115.

<sup>2</sup> Ibid., I. 231, 235, 279.

point commissioners, with authority to grant pardon, on submission, to individuals and to colonies, and after such submission to exempt them from its operation.<sup>1</sup> Great preparations were made to reduce the colonies to the submission required by this act, and a part of the troops that were to be employed were foreign mercenaries.

The necessity of a complete separation from the mother country, and the establishment of independent governments, had, therefore, in the winter of 1775-6, become apparent to the people of America. Accordingly, the Congress, asserting it to be irreconcilable to reason and good conscience for the people of the colonies any longer to take the oaths and affirmations necessary for the support of any government under the crown of Great Britain, and declaring that the exercise of every kind of authority under that crown ought to be suppressed, and a government of the people of the colonies substituted in its place, recommended to the respective assemblies and conventions of the colonies, where no government sufficient for the exigencies of their affairs had been already established, to adopt such a government as in the opinion of the representatives of the people would best conduce to the happiness and safety of their constituents and of America in general.<sup>2</sup>

It is apparent, therefore, that, previously to the Declaration of Independence, the people of the several colonies had established a national government of a revolutionary character, which undertook to act, and did act, in the name and with the general consent of the inhabitants of the country. This government was established by the union, in one body, of delegates representing the people of each colony; who, after they had thus united for national purposes, proceeded, in their respective jurisdictions, by means of conventions and other temporary arrangements, to provide for their domestic concerns by the establishment of local governments, which should be the successors of that authority of the British crown which they had "everywhere suppressed." The fact that these local or state governments were not formed until a union of the people of the different colonies for national pur-

<sup>1</sup> Annual Register.

<sup>2</sup> May 10, 1776. Journals, II. 166, 174.



poses had already taken place, and until the Congress had authorized and recommended their establishment, is of great importance in the constitutional history of this country ; for it shows that no colony, acting separately for itself, dissolved its own allegiance to the British crown, but that this allegiance was dissolved by the supreme authority of the people of all the colonies, acting through their general agent, the Congress, and not only declaring that the authority of Great Britain ought to be suppressed, but recommending that each colony should supplant that authority by a local government, to be framed by and for the people of the colony itself.

The powers exercised by the Congress, before the Declaration of Independence, show, therefore, that its functions were those of a revolutionary government. It is a maxim of political science, that, when such a government has been instituted for the accomplishment of great purposes of public safety, its powers are limited only by the necessities of the case out of which they have arisen, and of the objects for which they were to be exercised. When the acts of such a government are acquiesced in by the people, they are presumed to have been ratified by the people. To the case of our Revolution these principles are strictly applicable throughout. The Congress assumed at once the exercise of all the powers demanded by the public exigency, and their exercise of those powers was fully acquiesced in and confirmed by the people. It does not at all detract from the authoritative character of their acts, nor diminish the real powers of the Revolutionary Congress, that it was obliged to rely on local bodies for the execution of most of its orders, or that it couched many of those orders in the form of recommendations. They were complied with and executed, in point of fact, by the provincial congresses, conventions, and local committees to such an extent as fully to confirm the revolutionary powers of the Congress, as the guardians of the rights and liberties of the country. But we shall see, in the further progress of the history of the Congress, that while its powers remained entirely revolutionary, and were consequently coextensive with the great national objects to be accomplished, the want of the proper machinery of civil government and of independent agents of its own rendered it wholly incapable of wielding those powers successfully.

*Note to page 21.*

## ON WASHINGTON'S APPOINTMENT AS COMMANDER-IN-CHIEF.

The circumstances which attended the appointment of Washington to this great command are now quite well known. He had been a member of the Congress of 1774, and his military experience and accomplishments, and the great resources of his character, had caused his appointment on all the committees charged with making preparations for the defence of the colonies. Returned as a delegate from Virginia to the Congress of 1775, his personal qualifications pointed him out as the fittest person in the whole country to be invested with the command of any army which the United Colonies might see fit to raise; and it is quite certain that there would have been no hesitation about the appointment, if some political considerations had not been suggested as obstacles. At the moment when the choice was to be made, the scene of actual operations was in Massachusetts, where an army composed of troops wholly raised by the New England colonies, and under the command of General Ward, of that province, was besieging the enemy in Boston. This army was to be adopted by the Congress into the service of the continent, and serious doubts were entertained by some of the members of Congress as to the policy of appointing a Southern general to the command of it, and a good deal of delicacy was felt on account of General Ward, who, it was thought, might consider himself injured by such an appointment. On the other hand, there were strong reasons for selecting a general-in-chief from Virginia. That colony had taken the lead, among the Southern provinces, in the cause of the continent, and the appointment seemed to be due to her, if it was to be made upon political considerations. The motives for this policy were deemed sufficient to outweigh the objections arising from the character and situation of the army which the general would, in the first instance, have to command. But, after all, it cannot be doubted that the pre-eminent qualifications of Washington had far more weight with the majority of Congress than any dictates of mere policy between one part of the Union and another, or any local jealousies or sectional ambition.

Mr. John Adams, whose autobiography contains some statements on this subject, speaks of the existence of a Southern party against a Northern, and a jealousy against a New England army under the command of a New England general, which, he says, he discovered after the Congress had been some time in session, and after the necessity of having an army and a general had become a topic of conversation (Works, II. 415). In a letter, also, written by Mr. Adams in 1822 to Timothy Pickering, he states that, on the journey to Philadelphia, he and a party of his colleagues, the delegates from Massachusetts to this Congress, were met at Frankfort by Dr. Rush, Mr. Mifflin, Mr. Bayard, and others of the Philadelphia patriots, who desired a conference with them; that, in this conference, the Philadelphia gentlemen strongly advised the Massachusetts delegates not to come forward with bold measures, or to endeavor to take the lead; and represented that Virginia was the most populous state in the Union, proud

of its ancient dominions, and that "they [the Virginians] think they have a right to take the lead, and the Southern States, and the Middle States too, are too much disposed to yield it to them."

"I must confess," says Mr. Adams, "that there appeared so much wisdom and good sense in this, that it made a deep impression on my mind, and it had an equal effect on all my colleagues." "This conversation," he continues, "and the principles, facts, and motives suggested in it, have given a color, complexion, and character to the whole policy of the United States from that day to this. *Without it, Mr. Washington would never have commanded our armies; nor Mr. Jefferson have been the author of the Declaration of Independence; nor Mr. Richard Henry Lee the mover of it; nor Mr. Chase the mover of foreign connections. If I have ever had cause to repent of any part of this policy, that repentance ever has been and ever will be unavailing. I had forgot to say, nor had Mr. Johnson ever have been the nominator of Washington for general*" (Works, II. 512, 513).

Without impeaching the accuracy of Mr. Adams's recollection, on the score of his age when this letter was written, and without considering here how or why Mr. Jefferson came to be the author of the Declaration of Independence, it is believed that Mr. Adams states other facts, in his autobiography, sufficient to show that motives of policy towards Virginia were *not* the sole or the principal reasons why Washington was elected general. Mr. Adams states, in his autobiography, that at the time when he observed the professed jealousy of the South against a New England army under the command of a Northern general, it was very visible to him "that Colonel Washington was their object;" "and," he adds, "so many of our staunchest men were in the plan, that we could carry nothing without conceding it" (Works, II. 415). When Mr. Adams came, as he afterwards did, to put himself at the head of this movement, and to propose in Congress that the army at Cambridge should be adopted, and that a general should be appointed, he referred directly to Washington as the person whom he had in his mind, and spoke of him as "a gentleman from Virginia who was among us and very well known to all of us, a gentleman whose skill and experience as an officer, whose independent fortune, great talents, and excellent universal character, would command the approbation of all America, and unite the cordial exertions of all the colonies better than any other person in the Union. Mr. Washington, who happened to sit near the door, as soon as he heard me allude to him, from his usual modesty, darted into the library-room" (Works, II. 417). It is quite clear, therefore, that Mr. Adams put the appointment of Washington, in public, upon his qualifications and character, known all over the Union. He further states, that the subject came under debate, and that nobody opposed the appointment of Washington on account of any personal objection to him; and the only objection which he mentions as having been raised, was on the ground that the army near Boston was all from New England, and that they had a general of their own with whom they were entirely satisfied. He mentions one of the Virginia delegates, Mr. Pendleton, as concurring in this objection; that Mr. Sherman of Connecticut and Mr. Cushing

of Massachusetts also concurred in it, and that Mr. Paine of Massachusetts expressed strong personal friendship for General Ward, but gave no opinion upon the question. Afterwards, he says, the subject being postponed to a future day, "pains were taken out of doors to obtain a unanimity, and the voices were generally so clearly in favor of Washington, that the dissentient members were persuaded to withdraw their opposition, and Mr. Washington was nominated, I believe, by Mr. Thomas Johnson of Maryland, unanimously elected, and the army adopted" (Ibid).

It is worth while to inquire, therefore, what were the controlling reasons which so easily and so soon produced this striking unanimity. If it was brought about mainly by the exertions of a Southern against a Northern party, and by the yielding of Northern men to the Virginians from motives of policy, it would not have been accomplished with so much facility, although even a Washington were the candidate of Virginia. Sectional jealousies and sectional parties inflame each other; the struggles which they cause are protracted; and the real merits of men and things are lost sight of in the passions which they arouse. If policy, as a leading or a principal motive, gave to General Washington the great body of the Northern votes, there would have been more dissentients from that policy than any of the accounts authorize us to suppose there were at any moment while the subject was under consideration. Nor does the previous conduct of Virginia warrant the belief that her subsequent exertions in the cause of American liberty were mainly purchased by the honors bestowed upon her great men, or by so much of precedence as was yielded in the public councils to the unquestionable abilities of her statesmen. Some of them had undoubtedly been in favor of measures of conciliation to a late period; but some of them, as Washington, Patrick Henry, and Richard Henry Lee, had been, from an early period, convinced that the sword must decide the controversy. They were, perhaps, as much divided upon this point, until the army at Boston was adopted, as the leading men of other colonies. But when the necessity of that measure became apparent, it was the peculiar happiness of Virginia to be able to present to the country, as a general, a man whose character and qualifications threw all local and political objects at once into the shade. In order to form a correct judgment, at the present day, of the motives which must have produced a unanimity so remarkable and so prompt, we have only to recollect the previous history of Washington, as it was known to the Congress at the moment when he shrank from the mention of his name in that assembly.

He was forty-three years of age. From early youth he had had a training that eminently fitted him for the great part which he was afterwards to play, and which unfolded the singular capacities of his character to meet the extraordinary emergencies of the post to which he was subsequently called. That training had been both in military and in civil life. His military career had been one of much activity and responsibility, and had embraced several brilliant achievements. In 1751 it became necessary to put the militia of Virginia in a condition to defend the frontiers against the French and the Indians. The province was divided into military districts, in each of which an adjutant-gen-

eral, with the rank of major, was commissioned to drill and inspect the militia. Washington, at the age of nineteen, received the appointment to one of these districts; and in the following year the province was again divided into four grand military divisions, of which the northern was assigned to him as adjutant-general. In 1753 the French crossed the lakes, to establish posts on the Ohio, and were joined by the Indians. Major Washington was sent by the Governor of Virginia to warn them to retire. This expedition was one of difficulty and of delicacy. He crossed the Alleghany Mountains, reached the Ohio, had interviews with the French commander and the Indians, and returned to Williamsburg to make report to the governor. Of this journey, full of perilous adventures and narrow escapes, he kept a journal, which was published by the governor; was copied into most of the newspapers of the other colonies; and was reprinted in London as a document of much importance, exhibiting the views and designs of the French. In 1754 he was appointed, with the rank of lieutenant-colonel, second in command of the provincial troops raised by the legislature to repel the French invasion. On the first encounter with a party of the enemy, under Jumonville, on the 28th of May, 1754, the chief command devolved on Washington, in the absence of his superior. The French leader was killed, and most of his party were taken prisoners. Washington commanded also at the battle of the Great Meadows, and received a vote of thanks for his services from the House of Burgesses. This was in 1754, when he was at the age of twenty-two. During the next year, in consequence of the effect of some new arrangement of the provincial troops, he was reduced from the rank of colonel to that of captain, and thereupon retired from the army, with the consolation that he had received the thanks of his country for the services he had rendered. In 1755 he consented to serve as aide-de-camp to General Braddock, who had arrived from England with two regiments of regular troops. In this capacity he served in the battle of the Monongahela with much distinction. The two other aids were wounded and disabled early in the action, and the duty of distributing the general's orders devolved wholly upon Washington. It was in this battle that he acquired with the Indians the reputation of being under the special protection of the Great Spirit, because he escaped the aim of many of their rifles, although two horses were shot under him, and his dress was perforated by four bullets. His conduct on this occasion became known and celebrated throughout the country; and when he retired to Mount Vernon, as he did soon after, at the age of three-and-twenty, he not only carried with him a decisive reputation for personal bravery, but he was known to have given advice to Braddock, before the action, which all men saw, after it, would, if it had been duly heeded, have prevented his defeat. But he was not allowed to remain long in retirement. In August, 1755, he was appointed commander-in-chief of all the provincial forces of Virginia, and immediately entered upon the duties of reorganizing the old and raising new troops, in the course of which he visited all the outposts along the frontier. Soon afterwards, a dispute about rank having arisen with a person who claimed to take precedence of provincial officers because he had formerly held the king's commission, it became necessary for

Colonel Washington to make a visit to Boston, in order to have the point decided by General Shirley, the commander-in-chief of his majesty's armies in America. He commenced his journey on the 4th of February, 1756, and passed through Philadelphia, New York, New London, Newport, and Providence, and visited the governors of Pennsylvania and New York. In all the principal cities his character, and his remarkable escape at Braddock's defeat, made him the object of a strong public interest. At Boston he was received with marked distinction by General Shirley and by the whole society of the town, and the question of rank was decided according to his wishes. General Shirley explained to him the intended operations of the next campaign; and, after an absence from Virginia of seven weeks, he returned to resume his command. The next three years were spent in the duties of this laborious and responsible position, the difficulties and embarrassments of which bore a strong resemblance to those which he afterwards had to encounter in the war of the Revolution. In 1758 he commanded the Virginia troops in the expedition against Fort Duquesne, under General Forbes. Great deference was paid by that officer to his opinions and judgment, in arranging the line of march and order of battle, on this important expedition; for the fate of Braddock was before him. The command of the advanced division, consisting of one thousand men, was assigned to him, with the temporary rank of brigadier. When the army had approached within fifty miles of Fort Duquesne, the French deserted it; its surrender to the English closed the campaign; and in December Washington resigned his commission, and retired to Mount Vernon. What he had been, and what he then was, to the colony of Virginia, is shown by the address presented to him by the officers of the provincial troops on his retirement. "In our earliest infancy," said they, "you took us under your tuition, trained us up in the practice of that discipline which alone can constitute good troops, from the punctual observance of which you never suffered the least deviation. Your steady adherence to impartial justice, your quick discernment, and invariable regard to merit, wisely intended to inculcate those genuine sentiments of true honor and passion for glory from which the greatest military achievements have been derived, first heightened our natural emulation and our desire to excel. How much we improved by those regulations and your own example, with what alacrity we have hitherto discharged our duty, with what cheerfulness we have encountered the severest toils, especially while under your particular directions, we submit to yourself, and flatter ourselves that we have in a great measure answered your expectations. . . . It gives us additional sorrow, when we reflect, to find our unhappy country will receive a loss no less irreparable than our own. Where will it meet a man so experienced in military affairs, one so renowned for patriotism, conduct, and courage? Who has so great a knowledge of the enemy we have to deal with? Who so well acquainted with their situation and strength? Who so much respected by the soldiery? Who, in short, so able to support the military character of Virginia? Your approved love to your king and country, and your uncommon perseverance in promoting the honor and true interest of the service, convince us that the most cogent reasons only could induce you

to quit it; yet we, with the greatest deference, presume to entreat you to suspend those thoughts for another year, and to lead us on in the glorious work of extirpating our enemies, towards which so considerable advances have already been made. In you we place the most implicit confidence. Your presence only will cause a steady firmness and vigor to actuate every breast, despising the greatest dangers, and thinking light of toils and hardships, while led on by the man we know and love. But if we must be so unhappy as to part, if the exigencies of your affairs force you to abandon us, we beg it as our last request, that you will recommend some person most capable to command, whose military knowledge, whose honor, whose conduct, and whose disinterested principles we may depend on. Frankness, sincerity, and a certain openness of soul are the true characteristics of an officer, and we flatter ourselves that you do not think us capable of saying anything contrary to the purest dictates of our minds. Fully persuaded of this, we beg leave to assure you that, as you have hitherto been the actuating soul of our whole corps, we shall at all times pay the most invariable regard to your will and pleasure, and shall be always happy to demonstrate by our actions with how much respect and esteem we are," etc.

Washington's marriage took place soon after his resignation (January 6th, 1759), and his civil life now commenced. He had been elected a member of the House of Burgesses, before the close of the campaign, and in the course of the winter he took his seat. Upon this occasion, his inability, from confusion and modesty, to reply to a highly eulogistic address made to him by the speaker, Mr. Robinson, drew from that gentleman the celebrated compliment, "Sit down, Mr. Washington, your modesty equals your valor, and that surpasses the power of any language that I possess." He continued a member of the House of Burgesses until the commencement of the Revolution, a period of fifteen years. He was not a frequent speaker; but his sound judgment, quick perception, and firmness and sincerity of character, gave him an influence which the habit of much speaking does not give, and which is often denied to eloquence. As the time drew near when the controversies between the colonies and England began to assume a threatening attitude, he was naturally found with Henry, Randolph, Lee, Wythe, and Mason, and the other patriotic leaders of the colonies. His views concerning the policy of the non-importation agreements were early formed and made known. In 1769 he took charge of the Articles of Association, drawn by Mr. Mason, which were intended to bring about a concert of action between all the colonies, for the purpose of presenting them to the assembly, of which Mr. Mason was not a member. In 1774 he was chosen a member of the first Virginia Convention, and was by that body elected a delegate to the first Continental Congress, where he was undoubtedly the most conspicuous person present. The second Virginia Convention met in March, 1775, and re-elected the former delegates to the second Continental Congress, from which Washington was removed by his appointment as commander-in-chief.

There can be no doubt, therefore, that Washington was chosen commander-

in-chief for his unquestionable merits, and not as a compromise between sectional interests and local jealousies.

(The authorities for the statements in this note concerning Washington's history are the biographies by Marshall and Sparks, and the Writings of Washington, edited by the latter.)

I.—3



## CHAPTER III.

1776-1777.

### CONTINUANCE OF THE REVOLUTIONARY GOVERNMENT.—DECLARATION OF INDEPENDENCE.—PREPARATIONS FOR A NEW GOVERNMENT.—FORMATION OF THE CONTINENTAL ARMY.

ON the 7th of June, 1776, after the Congress had in fact assumed and exercised sovereign powers with the assent of the people of America, a resolution was moved by Richard Henry Lee of Virginia, and seconded by John Adams of Massachusetts, "That these United Colonies are, and of right ought to be, free and independent states; and that all political connection between them and the state of Great Britain is, and ought to be, totally suppressed."<sup>1</sup> This resolution was referred to a committee of the

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<sup>1</sup> Richard Henry Lee, the mover of this resolution, was born on the 20th of June, 1732, at Stratford, Westmoreland County, Virginia. His earlier education was completed in England, whence he returned in his nineteenth year. Possessed of a good fortune, he devoted himself to public affairs. At the age of twenty-five he entered the House of Burgesses, where he became a distinguished advocate of republican doctrines, and a strenuous opponent of the right claimed by Parliament to tax the colonies, of the Stamp Act, and of the other arbitrary measures of the home government, co-operating with Patrick Henry in all his great patriotic efforts. He was the author of the plan adopted by the House of Burgesses in 1773 for the formation of committees of correspondence, to be organized by the colonial legislatures, and out of which grew the plan of the Continental Congress. In 1774 he was elected one of the delegates from Virginia to the Congress, in which body, from his known ability as a political writer and his services in the popular cause, he was placed on the committees to prepare the addresses to the King, to the People of Great Britain, and to the People of the Colonies, the last of which he wrote. In the second Congress he was selected to move the resolution of independence; and besides serving on other very important committees, he furnished, as chairman of the committee instructed to prepare them, the commission and instructions to General Washington. As mover of the resolution of independence, he would, according to the usual practice, have been made chairman of the committee to prepare the Dec-

whole, and was debated until the 10th, when it was adopted in committee. On the same day a committee, consisting of five members,<sup>1</sup> was instructed to prepare a declaration "that these United Colonies are, and of right ought to be, free and independent states; that they are absolved from all allegiance to the British crown; and that all political connection between them and the state of Great Britain is, and ought to be, dissolved." The resolution introduced by Mr. Lee on the 7th was postponed until the 1st of July, to give time for greater unanimity among the members, and to enable the people of the colonies to instruct and influence their delegates.

The postponement was immediately followed by proceedings in the colonies, in most of which the delegates in Congress were either instructed or authorized to vote for the resolution of independence; and on the 2d of July that resolution received the assent in Congress of all the colonies, excepting Pennsylvania and Delaware. The Declaration of Independence was reported by the committee, who had been instructed to prepare it, on the 28th of June, and on the 4th of July it received the vote of every colony, and was published to the world.<sup>2</sup>

This celebrated instrument, regarded as a legislative proceeding, was the solemn enactment, by the representatives of all the colonies, of a complete dissolution of their allegiance to the British crown. It severed the political connection between the people of this country and the people of England, and at once erected

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laration; but on the 10th of June, the day when the subject was postponed, he was obliged to leave Congress, and return home for a short time, on account of the illness of some member of his family. He came back to Congress and remained a member until June, 1777, when he went home on account of ill-health. In August, 1778, he was again elected a member, and continued to serve until 1780; but from feeble health was compelled to take a less active part than he had taken in former years. He was out of Congress from 1780 until 1784, when he was elected its President, but retired at the end of the year. He was opposed to the Constitution of the United States, but voted in Congress to submit it to the people. After its adoption, he was elected one of the first senators under it from Virginia, and in that capacity moved and carried several amendments. In 1792 his continued ill-health obliged him to retire from public life. He died June 19, 1794.

<sup>1</sup> Thomas Jefferson, John Adams, Benjamin Franklin, Roger Sherman, and R. R. Livingston.

<sup>2</sup> See note at the end of the chapter.

the different colonies into free and independent states. The body by which this step was taken constituted the actual government of the nation, at the time, and its members had been directly invested with competent legislative power to take it, and had also been specially instructed to do so. The consequences flowing from its adoption were, that the local allegiance of the inhabitants of each colony became transferred and due to the colony itself, or, as it was expressed by the Congress, became due to the laws of the colony, from which they derived protection;<sup>1</sup> that the people of the country became thenceforth the rightful sovereign of the country; that they became united in a national capacity, as one people; that they could thereafter enter into treaties and contract alliances with foreign nations, could levy war and conclude peace, and do all other acts pertaining to the exercise of a national sovereignty; and finally, that, in their national capacity, they became known and designated as the United States of America. This Declaration was the first national state paper in which these words were used as the style and title of the nation. In the enacting part of the instrument, the Congress styled themselves "the representatives of the United States of America in general Congress assembled;" and from that period the previously "United Colonies" have been known as a political community, both within their own borders and by the other nations of the world, by the title which they then assumed.<sup>2</sup>

On the same day on which the committee for preparing the Declaration of Independence was appointed, another committee,

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<sup>1</sup> On the 24th of June, 1776, the Congress declared, by resolution, that "all persons abiding within any of the United Colonies, and deriving protection from the laws of the same, owed allegiance to the said laws, and were members of such colony; and that all persons passing through or making a temporary stay in any of the colonies, being entitled to the protection of the laws, during the time of such passage, visitation, or temporary stay, owed, during the same, allegiance thereto." Journals, II. 216.

<sup>2</sup> The title of "The United States of America" was formally assumed in the Articles of Confederation, when they came to be adopted. But it was in use, without formal enactment, from the date of the adoption of the Declaration of Independence. On the 9th of September, 1776, it was ordered that in all continental commissions and other instruments, where the words "United Colonies" had been used, the style should be altered to the "United States." Journals, II. 349.

consisting of one member from each colony, was directed "to prepare and digest the form of a confederation to be entered into between these colonies." This committee reported a draft of Articles of Confederation, on the 12th of July, which were debated in Congress on several occasions between that day and the 20th of August of the same year, at which time a new draft was reported, and ordered to be printed. The subject was not again resumed until the 8th of April, 1777; but, between that date and the 15th of the following November, sundry amendments were discussed and adopted, and the whole of the articles, as amended, were printed for the use of the Congress and the state legislatures. On the 17th of November a circular letter was reported and adopted, to be addressed to the legislatures of the thirteen states, recommending to them "to invest the delegates of the state with competent powers, ultimately, in the name and behalf of the state, to subscribe Articles of Confederation and Perpetual Union of the United States, and to attend Congress for that purpose on or before the 10th day of March next."<sup>1</sup>

A year and five months had thus elapsed between the agitation of the subject of a new form of national government and the adoption and recommendation of a form, by the Congress, for the consideration of the states.<sup>2</sup> During this interval the affairs of the country were administered by the Revolutionary Congress, which had been instituted, originally, for the purpose of obtaining redress peaceably from the British ministry, but which afterwards became *de facto* the government of the country, for all the purposes of revolution and independence. In order to appreciate the objects of the Confederation, the obstacles which it had to encounter, and the mode in which those obstacles were finally overcome, it is necessary here to take a brief survey of the national affairs during the period beginning with the commencement of the war and the Declaration of Independence, and extending to the date of the submission of the Articles of Confederation to the state legislatures. From no point of view can so much instruction be derived as from the position in which Washington stood during this period. By following the fortunes and appreciating

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<sup>1</sup> Journals, II. 263, 320; III. 123, 502, 513.

<sup>2</sup> From June 11, 1776, to November 17, 1777.

the exertions of him who had been charged with the great military duty of achieving the liberties of the country, and especially by observing his relations with the government that had undertaken the war, we can best understand the fitness of that government for the great task to which it had been called.

The continental government, which commissioned and sent Washington to take the command of the army which it had adopted, consisted solely of a body of delegates, chosen to represent the people of the several colonies or states, for certain purposes of national defence, safety, redress, and, finally, revolution. When the war had actually commenced, and the United Colonies were engaged in waging it, the Congress possessed, theoretically and rightfully, large political powers, of a revolutionary nature; but, practically, they had little direct civil power, either legislative or executive. They were obliged to rely almost wholly on the legislatures, provincial congresses and committees, or other local bodies of the several colonies or states, to carry out their plans. When Washington arrived at Cambridge and found the army then encamped around Boston in a state requiring it to be entirely remodelled, he came as the general of a government which could do little more for him than recommend him to the Provincial Congress, to the Committee of Safety, and to the prominent citizens of Massachusetts Bay. The people of the United States, at the present day, familiar with the apparatus of national power, can form some idea of Washington's position, and of that of the government which he served, from the fact that, when he left Philadelphia to take the command of the army, he requested the Massachusetts delegates to recommend to him bodies of men and respectable individuals, to whom he might apply to get done, through voluntary co-operation, what was absolutely essential to the existence of that army.<sup>1</sup> In truth, the whole of his residence in Massachusetts during the summer of 1775 and the winter of 1775-6, until he saw the British fleet go down the harbor of Boston, was filled with complicated difficulties, which sprang from the nature of the revolutionary government and the defects in its civil machinery, far more than from any and all other causes. These difficulties required the exertion of great

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<sup>1</sup> Sparks's Washington, III. 20, note.

intellectual and physical energy, the application of consummate prudence and forecast, and the patience and fortitude which in him were so happily combined with power. We may look back upon his efforts to encounter these obstacles as among the more prominent and striking manifestations of the strength of Washington's mind and character, and as among the most valuable proofs of what we owe to him.

On the one side of him was the body of delegates, sitting at Philadelphia, by whom he had been commissioned, who constituted the government of America, and from whom every direction, order, or requisition, concerning national affairs, necessarily proceeded. On the other side were the provincial congresses, and other public bodies of the New England colonies, on whom he and the Congress were obliged to rely for the execution of their plans. He was compelled to become the director of this complicated machinery. There were committees of the Congress, charged with the different branches of the public service; but Washington was obliged to attend personally to every detail, and to suggest, to urge, and to entreat action upon all the subjects that concerned the army and the campaign. His letters, addressed to the President of Congress, were read in that body, and votes or resolutions were passed to give effect to his requests or recommendations. But this was not enough. Having obtained the proper order or requisition, he was next obliged to see that it was executed by the local bodies or magistrates, with whom he not infrequently was forced to discuss the whole subject anew. He met with great readiness of attention, and every disposition to make things personally convenient and agreeable to him; but he found, as he has recorded, a vital and inherent principle of delay, incompatible with military service, in the necessity he was under to transact business through such numerous and different channels.<sup>1</sup> His applications to the Governor of Connecticut for hunting-shirts for the army;<sup>2</sup> to the Governor of Rhode Island for powder;<sup>3</sup> to the Massachusetts Provincial Congress to apprehend deserters and to furnish supplies;<sup>4</sup> and to the New York Provincial Congress to prevent their citizens from trading with the enemy in Boston<sup>5</sup>—together with the earnest appeals which

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<sup>1</sup> Works, III. 20.    <sup>2</sup> Ibid., 46.    <sup>3</sup> Ibid., 47.    <sup>4</sup> Ibid., 55.    <sup>5</sup> Ibid., 55.

he was obliged to make on these and many other subjects, which should never have been permitted to embarrass him—show how feeble were the powers and how defective was the machinery of the government which he served.

But there are two or three topics which it will be necessary to examine more particularly, in order fully to understand the character and working of the revolutionary government. The first of these is the formation of the army.

In order to carry on a war of any duration, it is the settled result of all experience that the soldier should be bound to serve for a period long enough to insure discipline and skill, and should be under the influence of motives which look to substantial pecuniary rewards, as well as those founded on patriotism. According to Washington's experience, this is as true of officers as it is of common soldiers; and undoubtedly no army can be formed, and kept long enough in the field to be relied upon for the accomplishment of great purposes, if these maxims are neglected in its organization.

Unfortunately, the Revolutionary Congress, at the very commencement of the war, committed the serious error of enlisting soldiers for short periods. When Washington arrived at Cambridge, the army which the Congress had just adopted as the continental establishment consisted of certain regiments raised on the spur of the moment by the provinces of Massachusetts, New Hampshire, Rhode Island, and Connecticut; acting under their respective officers; regulated by their own militia laws; and, with the exception of those from Massachusetts, under no legal obligation to obey the general then in command. The terms of service of most of these men would expire in the autumn; and as they had enlisted under their local governments for a special object, and had not been in service long enough to have merged their habits of thinking and feeling, as New England citizens, in the character of soldiers, they denied the power of their own governments or of the Congress to transfer them into another service, or to retain them after their enlistments had expired.<sup>1</sup>

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<sup>1</sup> Letters of General Washington to the President of Congress, September 21, 1775 (Works, III. 98); October 30, 1775 (Ibid., 137); November 8, 1775 (Ibid., 146).

The army was therefore to be entirely remodelled; or, to speak more correctly, an army was to be formed, by making enlistments under the Articles of War which had been adopted by the Congress, and by organizing new regiments and brigades under officers holding continental commissions. But the greatest difficulties had to be encountered in this undertaking. The continental Articles of War required a longer term of service than any of these troops had originally engaged for, and the rules and regulations were far more stringent than the discipline to which they had hitherto been subjected. There was, moreover, great reluctance on the part of both officers and men to serve in regiments consisting of the inhabitants of different colonies. A Connecticut captain would not serve under a Massachusetts colonel; a Massachusetts colonel was unwilling to command Rhode Island men; and the men were equally indisposed to serve under officers from another colony, or under any officers, in fact, but those of their own choosing.<sup>1</sup>

In this state of things a committee, consisting of Dr. Franklin, Mr. Lynch, and Colonel Harrison, was sent by the Congress to confer with Washington and with the local governments of the New England colonies, on the most effectual method of continuing, supporting, and regulating a continental army.<sup>2</sup> This committee arrived at Cambridge on the 18th of October, and sat until the 24th.<sup>3</sup> They rendered very important services to the commander-in-chief in the organization of the army; but in forming this first military establishment of the Union the strange error was committed by the Congress of enlisting the men for the term of one year only, if not sooner discharged; a capital mistake, the consequences of which were severely felt throughout the whole war.

There is no reason to suppose that Washington concurred in the expediency of such short enlistments, then or at any other time; but he was obliged to yield to the pressure of the

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<sup>1</sup> Letters of General Washington to Joseph Reed, November 8, 1775 (Works, III. 150); November 28, 1775 (Ibid., 177); and to the President of Congress, December 4, 1775 (Ibid., 184); to Governor Cooke of Connecticut, December 5, 1775 (Ibid., 188).

<sup>2</sup> Journals of Congress, II. 208, September 29, 1775.

<sup>3</sup> Writings of Washington, III. 123, note.



causes to which the mistake is fairly to be attributed. In fact, we find him, in a short time after the new system had been put into operation, pointing it out as a fatal error, in a letter to the President of Congress.<sup>1</sup> The error may have been owing to the character of the government, to the opinions and prejudices prevailing in Congress, and to the delusive idea, which still lingered in the minds of many of the members, that, although the sword had been drawn, the scabbard was not wholly thrown aside, and that they should be able to coerce the British ministry into a redress of grievances, which might be followed by a restoration of the relations between the colonies and the mother country, upon a constitutional basis. No such idea was entertained by Washington from the beginning. He harbored no thought of accommodation, after the measures adopted in consequence of the battle of Bunker's Hill.

But at the time of which I am now treating, the issue had not been made, as Washington would have made it; and, when we consider the state of things before the Declaration of Independence was adopted, and look attentively at the objects for which the Congress had been assembled, and at the nature of their powers, we may perceive how they came to make the mistake of not organizing a military establishment on a more permanent footing.

The delegates to the first Congress were, as has been seen, sent with instructions, which were substantially the same in all the colonies. These instructions, in some instances, looked to "a redress of grievances," and in others, to "the recovery and establishment of the just rights and liberties of the colonies;" and the delegates were directed "to deliberate upon wise and proper measures, to be by them recommended to all the colonies," for the attainment of these objects. But with this was coupled the declared object of a "restoration of union and harmony" upon "constitutional principles." We have seen how far this body proceeded towards a revolution. The second, or Revolutionary Congress, was composed of delegates who were originally assembled under similar instructions; but the conflict of arms that had already taken place, between the times of their respective appointments and the date of their meeting, had materially changed the

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<sup>1</sup> February 9, 1776 (Works, III. 278).

posture of affairs. Powers of a revolutionary nature had been cast upon them by the force of circumstances; and when they finally resolved to take the field, the character of those powers, as understood and acted upon by themselves, is illustrated by the commission which they issued to their general-in-chief, which embraced in its scope the whole vast object of "the defence of American liberty, and the repelling every hostile invasion thereof," by force of arms, and "by the rules and discipline of war, as herewith given."

It is obvious, therefore, that, at the time when the first Continental army was to be formed, the powers of the revolutionary government were very broad, although vague and uncertain. There seems to have been no reason, upon principle, why they should not have adopted decrees, to be executed by their own immediate agents, and by their own direct force. But a practical difficulty embarrassed and almost annulled this theoretical and rightful power. The government of the Congress rested on no definite, legislative faculty. When they came to a resolution, or vote, it constituted only a voluntary compact, to which the people of each colony pledged themselves, by their delegates, as to a treaty, but which depended for its observance entirely on the patriotism and good faith of the colony itself. No means existed of compelling obedience from a delinquent colony, and the government was not one which could operate directly upon individuals, unless it assumed the full exercise of powers derived from the revolutionary objects at which it aimed. These powers were not assumed and exercised to their full extent, for reasons peculiar to the situation of the country, and to the character, habits, and feelings of the people.

The people of the colonies had indeed sent their delegates to a congress, to consult and determine upon the measures necessary to be adopted in order to assert and maintain their rights. But they had never been accustomed to any machinery of government, or legislation, other than that existing in their own separate jurisdictions. They had imparted to the Congress no proper legislative authority, and no civil powers, except those of a revolutionary character. This revolutionary government was therefore entirely without civil executive officers, fundamental laws, or legal control over individuals; and the union of the

colonies, so far as a union had taken place, was one from which any colony could withdraw at any time, without violating any legal obligation.

In addition to this, the popular feeling on the subject of the grievances existing, and of the measures that ought to be taken for redress, was quite different in the different colonies, before the Declaration of Independence was adopted. The leading patriotic or Whig colonies made common cause with each other, with great spirit and energy, and the more lukewarm followed, but with unequal steps.<sup>1</sup> Virginia had, upon the whole, less to complain of than Massachusetts; but she adopted the whole quarrel of her Northern sister, with the firmness of her Washington and the ardor of her Henry. New York, on the other hand, for a considerable period, and down to the month of January, 1775, stood nearly divided between the Whigs and the Tories, and did not choose its delegates to the second Congress until the 20th of April—twenty days only before that body assembled.<sup>2</sup>

One of the most striking illustrations, both of the character of the revolutionary government and of the state of the country, is presented by the proceedings respecting the Loyalists, or, as

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<sup>1</sup> Mr. Jefferson once said to my kinsman, Mr. George Ticknor, that when they had any doubtful and difficult measure to carry in this Congress, they counted the four New England colonies and Virginia as *sure*; and then they looked round to see where they could get two more, to make the needful majority.

<sup>2</sup> The General Assembly of New York met on the 10th of January, 1775, and by a small majority refused to approve of the non-importation association formed by the first Congress, and also declined to appoint delegates to the second Congress, which was to assemble in May. They adopted, however, a list of grievances, which was substantially the same with that which had been put forth by the first Congress. Towards the close of the session, in the absence of some of the patriotic members, petitions to the king and to Parliament were adopted, which differed somewhat from the principles contained in their list of grievances, and in which they disapproved "of the violent measures that had been pursued in some of the colonies." But the people of New York generally conformed to the non-importation agreement; and on the 20th of April they met in convention and appointed delegates to the second Congress, "to concert and determine upon such matters as shall be judged most advisable for the preservation and re-establishment of American rights and privileges." Pitkin's *History of the United States*, I. 324.

they were called, the Tories. This is not the place to consider whether the American Loyalists were right or wrong in adhering to the crown. Ample justice is likely to be done, in American history, to the characters and motives of those among them whose characters and motives were pure. From a sense of duty, or from cupidity, or from some motive, good or bad, they made their election to adhere to the public enemy; and they were, therefore, rightfully classed, according to their personal activity and importance, among the enemies of the country, by those whose business it was to conduct its affairs and to fight its battles. Washington was, at a very early period, of opinion that the most decisive steps ought to be taken with these persons; and he seems at first to have acted as if it belonged, as in fact it did properly belong, to the commander of the Continental forces to determine when and how they should be arrested. He first had occasion to act upon the subject in November, 1775, when he sent Colonel Palfrey, one of his aides, into New Hampshire, with orders to seize every officer of the royal government who had given proofs of an unfriendly disposition to the American cause, and when he had secured them, to take the opinion of the Provincial Congress, or Committee of Safety, in what manner to dispose of them in that province.<sup>1</sup>

Early in the month of January, 1776, Washington was led to suppose that the enemy were about to send from Boston a secret expedition by water, for the purpose of taking possession of the city of New York; and it was believed that a body of Tories on Long Island, where they were numerous, were about rising, to join the enemy's forces on their arrival. While Washington was deliberating whether he should be warranted in sending an expedition to check this movement and to prevent the city from falling into the hands of the enemy, without first applying to Congress for a special authority, he received a letter from Major-

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<sup>1</sup> "I do not mean," the orders continued, "that they should be kept in close confinement. If either of these bodies should incline to send them to any interior towns, upon their parole not to leave them until they are released, it will meet with my concurrence. For the present, I shall avoid giving you the like order in respect to the Tories in Portsmouth; but the day is not far off when they will meet with this, or a worse fate, if there is not a considerable reformation in their conduct." Writings of Washington, III. 158, 159.

General Charles Lee, offering to go into Connecticut to raise volunteers, and to march to the neighborhood of New York, for the purpose of securing the city and suppressing the anticipated insurrection of the Tories.<sup>1</sup> He was inclined to adopt Lee's suggestion, but doubted whether he had power to disarm the people of an entire district, as a military measure, without the action of the civil authority of the province. Upon this point he consulted Mr. John Adams, who was then attending the Provincial Congress of Massachusetts. Mr. Adams gave it, unhesitatingly, as his clear opinion, that the commission of the commander-in-chief extended to the objects proposed in General Lee's letter; and he reminded Washington that it vested in him full power and authority to act as he should think for the good and welfare of the service.<sup>2</sup> Lee was thereupon authorized to raise volunteers and to proceed to the city of New York, which he was instructed to prevent from falling into the hands of the enemy, by putting it into the best posture of defence and by disarming all persons upon Long Island and elsewhere (and, if necessary, by otherwise securing them), whose conduct and declarations had rendered them justly suspected of designs unfriendly to the views of the Congress.<sup>3</sup> At the same time Washington wrote to the Committee of Safety of New York, informing them of the instructions which he had given to General Lee, and requesting their assistance; but without placing Lee under their authority.<sup>4</sup>

It happened that, at this time, while Washington was considering the expediency of sending this expedition, the Congress had under consideration the subject of disarming the Tories in Queen's County, Long Island, where the people had refused to elect members to the Provincial Convention.<sup>5</sup> Two battalions

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<sup>1</sup> Writings of Washington, III. 230, note.

<sup>2</sup> Writings of Washington, III. 230, note. See also Marshall's *Life of Washington*, II. 285-287.

<sup>3</sup> Writings of Washington, III. 230.

<sup>4</sup> *Ibid.*, note.

<sup>5</sup> Journals of Congress, II. 7-9, January 3, 1776. Congress had, on the 2d of January, passed resolves recommending to the different assemblies, conventions, and committees or councils of safety to restrain the Tories, and had declared that they ought to be disarmed, and the more dangerous of them kept in cus-

of minute-men had been ordered to enter that county, at its opposite sides, on the same day, and to disarm every inhabitant who had voted against choosing members to the convention.<sup>1</sup> A part of these orders were suddenly countermanded, and in place of the

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tody. For this purpose the aid of the Continental troops stationed in or near the respective colonies was tendered to the local authorities. Journals, II. 4, 5.

<sup>1</sup> The resolves of the Congress on this subject amounted to an outlawry of the persons against whom they were directed. They were introduced by a preamble, reciting the disaffection of a majority of the inhabitants of Queen's County, evinced by their refusal to elect deputies to the convention of the colony, by their public declaration of a design to remain inactive spectators of the contest, and their general want of public spirit; and declaring that "those who refuse to defend their country should be excluded from its protection, and prevented from doing it injury." The first resolve then proceeded to declare that all the inhabitants of Queen's County named in a list of delinquents published by the Convention of New York be put out of the protection of the United Colonies, that all trade and intercourse with them cease, and that no inhabitant of that county be permitted to travel or abide in any part of the United Colonies, out of that county, without a certificate from the Convention or Committee of Safety of New York, setting forth that such inhabitant is a friend to the American cause, and not of the number of those who voted against sending deputies to the convention; and that any inhabitant found out of the county, without such certificate, be apprehended and imprisoned three months. The second resolve declared that any attorney or lawyer who should commence, prosecute, or defend any action at law, for any inhabitant of Queen's County who voted against sending deputies to the convention, ought to be treated as an enemy to the American cause. The fourth resolve directed that Colonel Nathaniel Heard, of Woodbridge, N. J., should march, with five or six hundred minute-men, to the western part of Queen's County, and that Colonel Waterbury, of Stamford, Connecticut, with the same number of minute-men, march to the eastern side; that they confer together and endeavor to enter the county on the same day, and that they proceed to disarm every person in the county who voted against sending deputies to the convention, and cause them to deliver up their arms and ammunition on oath, and confine in safe custody, until further orders, all those who should refuse compliance. These resolves were passed on the 3d of January, 1776, and were reported by a committee on the state of New York. On the 10th of January, on account of "the great distance from Colonel Heard to Colonel Waterbury, and the difficulty of co-operating with each other in their expedition into Queen's County," Congress directed Lord Stirling to furnish Colonel Heard with three companies from his command, who were to join Colonel Heard with his minute-men, and proceed immediately on the expedition; and also directed Heard to inform Waterbury that his services would not be required. Journals, II. 21.

minute-men from Connecticut, three companies were ordered to be detailed for this service from the command of Lord Stirling. This change in the original plan was made on the 10th of January; and when Washington received notice of it from Lee, he seems to have understood it as an abandonment of the whole scheme of the expedition—a course which he deeply regretted.<sup>1</sup> He thought that the period had arrived when nothing less than the most decisive measures ought to be pursued; that the enemies of the country were sufficiently numerous on the other side of the Atlantic, and that it was highly important to have as few internal ones as possible. But supposing that Congress had changed their determination, he directed Lee to disband his troops so soon as circumstances would in his judgment admit of it.<sup>2</sup> Lee was at this time at Stamford in Connecticut, with a body of about twelve hundred men, whom he had raised in that colony, preparing to march to New York to execute the different purposes for which he had been detached. On the 22d of January—the day before the date of Washington's letter to him directing him to disband his forces—he had written to the President of Congress, urging in the strongest terms the expediency of seizing and disarming the Tories;<sup>3</sup> and he immediately communicated to Washington the fact of his having done so. Washington wrote again on the 30th, informing Lee that General Clinton had gone from Boston on some expedition with four or five hundred men; that there was reason to believe that this expedition had been sent on the application of Tryon, the royal governor of New York, who, with a large body of the inhabitants, would probably join it; and that the Tories ought, therefore, to be disarmed at once, and the principal persons among them seized. He also expressed the hope that Congress would empower General Lee to act conformably to both their wishes; but that, if they should order differently, their directions must be obeyed.<sup>4</sup>

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<sup>1</sup> He received this impression from General Lee, who wrote on the 16th of January and informed him that Colonel Waterbury had "received orders to disband his regiment, and the Tories are to remain unmolested till they are joined by the king's assassins." Sparks's *Life of Gouverneur Morris*, I. 75.

<sup>2</sup> Letter to General Lee, January 23, 1776. Writings of Washington, III. 255.

<sup>3</sup> Marshall's *Life of Washington*, II. Appendix, xvii.

<sup>4</sup> Letter to General Lee, January 31, 1776. Writings of Washington, III. 275.

Washington was mistaken in supposing that Congress had resolved to abandon the expedition against the Tories of Queen's County. That expedition had actually penetrated the county, under Colonel Heard, who had arrested nineteen of the principal inhabitants and conducted them to Philadelphia. Congress directed them to be sent to New York, and delivered to the order of the convention of that colony, until an inquiry could be instituted by the Convention into their conduct, and a report thereon made to Congress.<sup>1</sup>

This destination of the prisoners had become necessary, in consequence of the local fears and jealousies excited by the approach of General Lee to the city of New York, at the head of a force designed to prevent it from falling into the possession of the enemy. The inhabitants of the city were not a little alarmed at the idea of its becoming a post to be contended for; and the Committee of Safety wrote to General Lee earnestly deprecating his approach.<sup>2</sup> Lee replied to them, and continued his march, enclosing their letter to Congress. It was received in that body on the 26th, and a committee of three members was immediately appointed to repair to New York, to consult and advise with the Council of Safety of the Colony, and with General Lee, respecting the defence of the city.<sup>3</sup> The Provincial Congress of New York were in session at the time of the arrival of this committee,<sup>4</sup> and, in consequence of the temper existing in that body and in the local committees, the Continental Congress found themselves obliged to recede from the course which they had taken of disarming the Tories of Queen's County by their own action, and to submit the whole subject again to the colonial authorities everywhere, by a mere recommendation to them to disarm all persons, within their respective limits, notoriously disaffected to the American cause.<sup>5</sup>

Thus, after having resolved on the performance of a high act of sovereignty, which was entirely within the true scope of their

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<sup>1</sup> February 6, 1776. Journals, II. 51.

<sup>2</sup> Sparks's Life of Gouverneur Morris, I. 75, 76. They wished to "save appearances with the [enemy's] ships of war, till at least the month of March."

<sup>3</sup> January 26, 1776. Journals, II. 39.

<sup>4</sup> January 30.

<sup>5</sup> March 14, 1776. Journals, II. 91.



revolutionary powers, and eminently necessary, the Congress was obliged to content itself with a recommendation on the subject to the colonial authorities; not only because it felt itself, as a government, far from secure of the popular co-operation in many parts of the country, but because it had not finally severed the political tie which had bound the country to the crown of Great Britain, and because it had no civil machinery of its own, through which its operations could be conducted.

Another topic, which illustrates the character of the early revolutionary government, is the entire absence, at the period now under consideration, of a proper national tribunal for the determination of questions of prize—a want which gave Washington great trouble and embarrassment during his residence at Cambridge and for some time afterwards. As this subject is connected with the origin of the American navy, a brief account may here be given of the commencement of naval operations by the United Colonies.

When Washington arrived at Cambridge no steps had been taken by the Continental Congress towards the employment of any naval force whatever. In June, 1775, two small schooners had been fitted out by Rhode Island to protect the waters of that colony from the depredations of the enemy; and in the same month the Provincial Congress of Massachusetts resolved to provide six armed vessels; but none of them were ready in the month of October.<sup>1</sup> In the early part of that month the first movement was made by the Continental Congress towards the employment of a naval force. Washington was then directed to fit out two armed vessels, with all possible despatch, to sail for the mouth of the St. Lawrence, in order to intercept certain ships from England bound to Quebec with powder and stores. He was to procure these vessels from the government of Massachusetts.\* The authorities of Massachusetts had then made no such provision; but in the latter part of August Washington had, on the broad authority of his commission, proceeded to fit out six armed schooners to cruise in the waters of Massachusetts Bay, so as to intercept

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<sup>1</sup> Letter of Washington to the President of Congress.

\* Resolve passed October 5, 1775. Journals of Congress, II. 197.

the enemy's supplies coming into the port of Boston. One of them sailed in September, and in the course of a few weeks they were all cruising between Cape Ann and Cape Cod.<sup>1</sup>

On the 17th of September, 1775, the town of Falmouth, in Massachusetts (now Portland, in Maine), was burned by the enemy. This act stimulated the Continental Congress to order the fitting out of two armed vessels on the 26th of October, and of two others on the 30th. It also stimulated the Massachusetts Assembly to issue letters of marque and reprisal, and to pass an act establishing a court to try and condemn all captures made from the enemy by the privateers and armed vessels of that colony.

In the autumn of this year, therefore, there were two classes of armed vessels cruising in the waters of Massachusetts: one consisting of those sailing under the continental authority, and the other consisting of those sailing under the authority of the Massachusetts Assembly. Captures were made by each, and some of those sailing under the continental authority were quite successful. Captain Manly, commanding the *Lee*, took, in the latter part of November, a valuable prize, with a large cargo of arms, ammu-

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<sup>1</sup> These vessels were fitted out from the ports of Salem, Beverly, Marblehead, and Plymouth. They were officered and manned chiefly by sea-captains and sailors who happened to be at that time in the army. They sailed under instructions from Washington, to take and seize all vessels in the ministerial service bound into or out of Boston having soldiers, arms and ammunition, or provisions on board, and to send them into the nearest port, under a careful prize-master, to wait his further directions. The first person commissioned in this way by the commander-in-chief was Captain Nicholas Broughton, of Marblehead, who sailed in the schooner *Hannah*, fitted out at Beverly; and in his instructions he was described as "a captain in the army of the United Colonies of North America," and was directed to take the command of "a detachment of said army, and proceed on board the schooner *Hannah*, lately fitted out, etc., at the continental expense." Another of these vessels, called the *Lee*, was commanded by Captain John Manly. The names of three others of them were the *Harrison*, the *Washington*, and the *Lynch*. The name of the sixth vessel is not known, but the names of the four other captains were Selman, Martindale, Coit, and Adams (Writings of Washington, III. 516). When Washington received directions from the President of Congress to send two vessels to the mouth of the St. Lawrence, he wrote, on the 12th of October, that one of these vessels was then out, and that two of them would be despatched as directed, immediately (Ibid., III. 124). In the course of a few weeks they were all out.

dition, and military tools; and several other captures followed before any provision had been made for their condemnation—a business which was thus thrown entirely upon the hands of Washington.

The court established by the Legislature of Massachusetts, at its session in the autumn of 1775, for the trial and condemnation of all captures from the enemy, was enabled to take cognizance only of captures made by vessels fitted out by the province or by citizens of the province. As the cruisers fitted out at the continental expense did not come under this law, Washington, early in November, called the attention of Congress to the necessity of establishing a court for the trial of prizes made by continental authority.<sup>1</sup> On the 25th of November the Congress passed resolves ordering all trials of prizes to be held in the court of the colony into which they should be brought, with a right of appeal to Congress.<sup>2</sup> But these resolves do not seem to have been, for a considerable period of time, communicated to Washington; for, during the months of November, December, and January, he supposed it to be necessary for him to attend personally to the adjudication of prizes made by continental vessels,<sup>3</sup> and it was not until the early part of February that the receipt of the resolves of Congress led to a resort to the jurisdiction of the Admiralty Court of Massachusetts. When, however, this was done, an irreconcilable difference was found to exist between the resolves of Congress and the laws of the colony respecting the proceedings; the trials were stopped for a long time, to enable the General

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<sup>1</sup> Letter to the President of Congress, November 11, 1775. (Writings of Washington, III. 154.)

<sup>2</sup> Journals, I. 260.

<sup>3</sup> On the 4th of December he repeated his former recommendation to the President of Congress (Writings of Washington, III. 184). On the 26th of December he wrote to Richard Henry Lee, in Congress, begging him to use his influence in having a court of admiralty or some power appointed to hear and determine all matters relative to captures, saying, "You cannot conceive how I am plagued on this head, and how impossible it is for me to hear and determine upon matters of this sort, when the facts, perhaps, are only to be ascertained at ports forty, fifty, or more miles distant, without bringing the parties here [Cambridge] at great trouble and expense. At any rate, my time will not allow me to be a competent judge of this business." *Ibid.*, III. 217.

Court of Massachusetts to alter their law so as to make it conform to the resolves; and in the meanwhile many of the captors, weary of the law's delay, applied, without waiting for the decisions, for leave to go away, which Washington granted.<sup>1</sup> As late as the 25th of April, 1776, there had been no trials of any of the prizes brought into Massachusetts Bay. At that date Washington wrote to the President of Congress, from New York, that some of the vessels which he had fitted out were laid up, the crews being dissatisfied because they could not obtain their prize-money; that he had appealed to the Congress on the subject; and that, if a summary way of proceeding were not resolved on, it would be impossible to have the continental vessels manned. At this time Captain Manly and his crew had not received their share of the valuable prize taken by them in the autumn previous.<sup>2</sup>

Another remarkable defect in the revolutionary government was found in the mode in which it undertook to supply the means of defraying the public expenses. It was a government entirely without revenues of any kind; for, in constituting the Congress, the colonies had not clothed their delegates with power to lay taxes or to establish imposts. At the time when hostilities were actually commenced the commerce of the country was almost totally annihilated; so that if the Congress had possessed power to derive a revenue from commerce, little could have been obtained for a long period after the commencement of the war. But the power did not exist; money in any considerable quantity could not be borrowed at home; the expedient of foreign loans had not been suggested; and consequently the only remaining expedient to which the Congress could resort was, like other governments similarly situated, to issue paper money. The mode in which this was undertaken to be done was, in the first instance, to issue two millions of Spanish milled dollars, in the form of bills of various denominations, from one dollar to eight dollars each, and a few of twenty dollars, designed for circulation as currency. The whole number of bills which made up the sum of \$2,000,000

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<sup>1</sup> Letter to the President of Congress, February 9, 1776. *Ibid.*, III. 282.  
Letter to Joseph Reed, February 10, 1776. *Ibid.*, III. 284.

<sup>2</sup> *Ibid.*, III. 370.

was 403,800.<sup>1</sup> The next emission amounted to \$1,000,000, in bills of thirty dollars each, and was ordered on the 25th of July.<sup>2</sup> When the bills of the first emission were prepared it would seem to have been the practice to have them signed by a committee of the members; but this was found so inconvenient, from the length of time during which it withdrew the members from the other business of Congress, that, when the second emission was ordered, a committee of twenty-eight citizens of Philadelphia was appointed for the purpose, and the bills were ordered to be signed by any two of them.<sup>3</sup> At this time no continental treasurers had been appointed.<sup>4</sup>

Such a clumsy machinery was poorly adapted to the supply of a currency demanded by the pressing wants of the army and of the other branches of the public service. The signers of the bills were extremely dilatory in their work. In September, 1775, the paymaster and commissary, at Cambridge, had not a single dollar in hand, and they had strained their credit, for the subsistence of the army, to the utmost; the greater part of the troops were in a state not far from mutiny, in consequence of the deduction which had been made from their stated allowance; and there was imminent danger, if the evil were not soon remedied, and greater punctuality observed, that the army would absolutely break up. In November Washington deemed it highly desirable to adopt a system of advanced pay, but the unfortunate state of the military chest rendered it impossible. There was not cash sufficient to pay the troops for the months of October and November. Through

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<sup>1</sup> This was the emission ordered on the 23d of June, 1775. There were *forty-nine thousand* bills of each denomination from one dollar to eight dollars, inclusive, and *eleven thousand eight hundred* bills of the denomination of twenty dollars. The form of the bills was as follows (Journals, I. 126):

CONTINENTAL CURRENCY.

No.	Dollars.
This Bill entitles the Bearer to receive Dollars, or the value thereof in Gold or Silver, according to the Resolutions of the Congress, held at Philadelphia on the 10th day of May, A.D. 1775.	Spanish milled

<sup>2</sup> Journals, I. 177.

<sup>3</sup> Journals, I. 126, 177. The signers of the bills were allowed a commission of one dollar and one third of a dollar on each thousand of the bills signed by them. Ibid.

<sup>4</sup> Ante, p. 22.

the months of December and January the signing of the bills did not keep pace with the demands of the army, notwithstanding Washington's urgent remonstrances; and in February his wants became so pressing that he was obliged to borrow twenty-five thousand pounds of the Province of Massachusetts Bay, in order that the recruiting service might not totally cease.<sup>1</sup>

These facts show significantly that, before the Declaration of Independence, scarcely any progress had been made towards the formation of a national government with definite powers and appropriate departments. In matters of judicature and in measures requiring executive functions and authority the Congress were obliged to rely almost entirely upon the local institutions and the local civil machinery of the different colonies; while, in all military affairs, the very form of the revolutionary government was unfavorable to vigor, despatch, and consistent method. There were also causes existing in the temper and feelings of many of the members of that government, both before and after the Declaration of Independence, which at times prevented the majority from acting with the decision and energy demanded by the state of their affairs. Many excellent and patriotic men in the Congress of 1775-6, while they concurred fully in the necessity for resistance to the measures of the British ministry, and had decided, or were fast deciding, that a separation must take place, still entertained a great jealousy of standing armies. This jealousy began to exhibit itself very soon after the appointment of the commander-in-chief, and was never wholly without influence in the proceedings of Congress during the entire period of the war. It led to a degree of reliance upon militia which, in the situation of the colonies, was too often demonstrated to be a weak and fatal policy.<sup>2</sup>

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<sup>1</sup> Writings of Washington, III. 104, 167, 173, 178, 288.

<sup>2</sup> Writings of Washington, III. 278, IV. 115, V. 328. Mr. Sparks has preserved an anecdote which shows the perpetuation of this feeling about standing armies, and evinces also that Washington possessed more humor than has been generally attributed to him. In the convention for forming the Constitution of the United States, some member proposed to insert a clause in the Constitution limiting the army of the United States to *five thousand men*. Washington, who was in the chair, observed that he should not object to such a clause if it were so amended as to provide that no enemy should ever presume to invade the United States with more than *three thousand*.

*Note to page 35.*

## ON THE DECLARATION OF INDEPENDENCE.

The Declaration of Independence was drawn by Thomas Jefferson; and the circumstances under which he was selected for this honorable and important task were for some time in doubt, and that doubt increased by the publication of a part of the Works of Mr. John Adams. The evidence on the subject is to be derived chiefly from statements made by both of these eminent persons in their memoirs, and in a letter written by each of them. We have seen, in a former note, that in 1822 Mr. Adams declared, that had it not been for a conversation which occurred in 1775, before the meeting of the Congress of that year, between himself and his Massachusetts colleagues and certain of the Philadelphia "Sons of Liberty," in which the Massachusetts members were advised to concede precedence to Virginia from motives of policy, and but for the principles, facts, and motives suggested in that conversation, many things would not have happened which did occur, and, among them, that Mr. Jefferson never would have been the author of the Declaration of Independence. In regard to the same speculation concerning the election of Washington as commander-in-chief, I have ventured, on Mr. Adams's own authority, to suggest doubts whether that election ought now to be considered to have turned upon motives which Mr. Adams made so prominent in 1822. In regard to the authorship of the Declaration of Independence, I shall only endeavor to state fairly and fully the conflicting evidence, in order that the reader may judge what degree of weight ought to be assigned to the cause, *without* which Mr. Adams supposed Mr. Jefferson would not have been selected to draft it.

Mr. Jefferson, as it appeared when his writings came to be published in 1829, wrote in 1821, when at the age of seventy-seven, a memoir of some of the public transactions in which he had been engaged. At this time he had in his possession a few notes of the debates which took place in Congress on the subject of independence, and which he made at the time. These notes he inserted bodily, as they stood, in his memoir, and they are so printed (Jefferson's Works, I. 10-14). They are easily distinguishable from the text of the memoir, but they do not appear to throw any especial light upon the fact now in controversy; although, as Mr. Jefferson, in 1823, when writing on this subject, supported his recollection by "written notes, taken at the moment and on the spot," it is proper to allow that those notes may in some way have aided his memory, although we cannot now see in what way they did so. He made this latter reference in a letter which he wrote to Mr. Madison, in reply to the statements in Mr. Adams's letter to Timothy Pickering, under date of August 6, 1822. (Jefferson's Works, IV. 375, 376.)

At or near the beginning of the present century, Mr. Adams, then about sixty-six, wrote an autobiography, which was published in 1850, and in which he gave an account of the authorship of the Declaration. In 1822, when about

eighty-six, Mr. Adams wrote the letter to Mr. Pickering which called forth Mr. Jefferson's contradiction in his letter to Mr. Madison, under date of August 30, 1823 (Adams's Works, II. 510-515). Mr. Jefferson, in his memoir written in 1821, states simply that the committee for drawing the Declaration desired him to do it; that he accordingly wrote it, and that, being approved by the committee, he reported it to the Congress on Friday, the 28th of June, when it was read and ordered to lie on the table; and that on Monday, the 1st of July, the Congress, in committee of the whole, proceeded to consider it. "The pusillanimous idea," he continues, "that we had friends in England worth keeping terms with, still haunted the minds of many. For this reason those passages which conveyed censures on the people of England were struck out, lest they should give them offence. The clause, too, reprobating the enslaving the inhabitants of Africa, was struck out in complaisance to South Carolina and Georgia, who had never attempted to restrain the importation of slaves, and who, on the contrary, wished to continue it. Our Northern brethren, also, I believe, felt a little tender under those censures; for though their people had very few slaves themselves, yet they had been pretty considerable carriers of them to others. The debates having taken up the greater parts of the 2d, 8d, and 4th days of July, were, on the evening of the last, closed." (Jefferson's Works, I. 14, 15.)

In Mr. Adams's autobiography the following account is given: "The Committee of Independence were Thomas Jefferson, John Adams, Benjamin Franklin, Roger Sherman, Robert R. Livingston. Mr. Jefferson had been now about a year a member of Congress, but had attended his duty in the House a very small part of the time, and, when there, had never spoken in public. During the whole time I sat with him in Congress, I never heard him utter three sentences together. It will naturally be inquired how it happened that he was appointed on a committee of such importance. There were more reasons than one. Mr. Jefferson had the reputation of a masterly pen; he had been chosen a delegate in Virginia, in consequence of a very handsome public paper which he had written for the House of Burgesses, which had given him the character of a fine writer. Another reason was, that Mr. Richard Henry Lee was not beloved by the most of his colleagues from Virginia, and Mr. Jefferson was set up to rival and supplant him. This could be done only by the pen, for Mr. Jefferson could stand no competition with him or any one else in elocution and public debate. . . . The committee had several meetings, in which were proposed the articles of which the Declaration was to consist, and minutes made of them. The committee then appointed Mr. Jefferson and me to draw them up in form, and clothe them in a proper dress. The sub-committee met, and considered the minutes, making such observations on them as then occurred, when Mr. Jefferson desired me to take them to my lodgings, and make the draft. This I declined, and gave several reasons for declining: 1. That he was a Virginian, and I a Massachusettensian. 2. That he was a Southern man, and I a Northern one. 3. That I had been so obnoxious for my early and constant zeal in promoting the measure, that any draft of mine would undergo a more severe scrutiny



and criticism in Congress than one of his composition. 4. And lastly, and that would be reason enough if there were no other, I had a great opinion of the elegance of his pen, and none at all of my own. I therefore insisted that no hesitation should be made on his part. He accordingly took the minutes, and in a day or two produced to me his draft. Whether I made or suggested any corrections I remember not. The report was made to the committee of five, by them examined, but whether altered or corrected in anything I cannot recollect. But, in substance, at least, it was reported to Congress, where, after a severe criticism, and striking out several of the most oratorical paragraphs, it was adopted on the 4th of July, 1776, and published to the world." (Adams's Works, II. 511-515.)

The account in Mr. Adams's letter to Mr. Pickering is as follows: "You inquire why so young a man as Mr. Jefferson was placed at the head of the committee for preparing a Declaration of Independence? I answer, it was the Frankfort advice to place Virginia at the head of everything. Mr. Richard Henry Lee might be gone to Virginia, to his sick family, for aught I know; but that was not the reason of Mr. Jefferson's appointment. There were three committees appointed at the same time. One for the Declaration of Independence, another for preparing Articles of Confederation, and another for preparing a treaty to be proposed to France. Mr. Lee was chosen for the Committee of Confederation, and it was not thought convenient that the same person should be upon both. Mr. Jefferson came into Congress in June, 1775, and brought with him a reputation for literature, science, and a happy talent of composition. Writings of his were handed about, remarkable for their peculiar felicity of expression. Though a silent member in Congress, he was so prompt, frank, explicit, and decisive upon committees and in conversation—not even Samuel Adams was more so—that he soon seized upon my heart; and upon this occasion I gave him my vote, and did all in my power to procure the votes of others. I think he had one more vote than any other, and that placed him at the head of the committee. I had the next highest number, and that placed me second. The committee met, discussed the subject, and then appointed Mr. Jefferson and me to make the draft, I suppose because we were the two first on the list. The sub-committee met. Jefferson proposed to me to make the draft. I said, 'I will not.' 'You should do it.' 'Oh, no.' 'Why will you not? You ought to do it.' 'I will not.' 'Why?' 'Reasons enough.' 'What can be your reasons?' 'Reason first,—You are a Virginian, and a Virginian ought to appear at the head of this business. Reason second,—I am obnoxious, suspected, and unpopular. You are very much otherwise. Reason third,—You can write ten times better than I can.' 'Well,' said Jefferson, 'if you are decided, I will do as well as I can.' 'Very well. When you have drawn it up, we will have a meeting.'

"A meeting we accordingly had, and conned the paper over. I was delighted with its high tone and the flights of oratory with which it abounded, especially that concerning negro slavery, which, though I knew his Southern brethren would never suffer to pass in Congress, I certainly never would oppose. There

were other expressions which I would not have inserted, if I had drawn it up, particularly that which called the king tyrant. I thought this too personal; for I never believed George to be a tyrant in disposition and in nature; I always believed him to be deceived by his courtiers on both sides of the Atlantic, and in his official capacity only, cruel. I thought the expression too passionate, and too much like scolding, for so grave and solemn a document; but as Franklin and Sherman were to inspect it afterwards, I thought it would not become me to strike it out. I consented to report it, and do not now remember that I made or suggested a single alteration.

We reported it to the committee of five. It was read, and I do not remember that Franklin or Sherman criticised anything. We were all in haste. Congress was impatient, and the instrument was reported, as I believe, in Jefferson's handwriting, as he first drew it. Congress cut off about a quarter of it, as I expected they would; but they obliterated some of the best of it, and left all that was exceptionable, if anything in it was. I have long wondered that the original draft has not been published. I suppose the reason is, the vehement philippic against negro slavery.

"As you justly observe, there is not an idea in it but what had been hackneyed in Congress for two years before. The substance of it is contained in the Declaration of Rights and the violation of those rights, in the Journals of Congress, in 1774. Indeed, the essence of it is contained in a pamphlet, voted and printed by the town of Boston, before the first Congress met, composed by James Otis, as I suppose, in one of his lucid intervals, and pruned and polished by Samuel Adams."

Mr. Jefferson, on the contrary, in his letter to Mr. Madison, says: "These details are quite incorrect. The committee of five met; no such thing as a sub-committee was proposed, but they unanimously pressed on myself alone to undertake the draft. I consented; I drew it; but, before I reported it to the committee, I communicated it *separately* to Doctor Franklin and Mr. Adams, requesting their correction, because they were the two members of whose judgments and amendments I wished most to have the benefit, before presenting it to the committee; and you have seen the original paper now in my hands, with the corrections of Doctor Franklin and Mr. Adams interlined in their own writings. Their alterations were two or three only, and merely verbal. I then wrote a fair copy, reported it to the committee, and from them, unaltered, to Congress. This personal communication and consultation with Mr. Adams he has misremembered into the actings of a sub-committee. Pickering's observations, and Mr. Adams's in addition, 'that it contained no new idea, that it is a commonplace compilation, its sentiments hackneyed in Congress for two years before, and its essence contained in Otis's pamphlet,' may all be true. Of that I am not to be the judge. Richard Henry Lee charged it as copied from Locke's *Treatise on Government*. Otis's pamphlet I never saw, and whether I had gathered my ideas from reading or reflection I do not know. I know only that I turned to neither book nor pamphlet while writing it. I did not consider it as any part of my charge to invent new ideas altogether, and to offer no senti-

ment which had ever been expressed before. Had Mr. Adams been so restrained, Congress would have lost the benefit of his bold and impressive advocations of the rights of revolution. For no man's confident and fervid addresses, more than Mr. Adams's, encouraged and supported us through the difficulties surrounding us, which, like the ceaseless action of gravity, weighed on us by night and by day. Yet, on the same ground, we may ask what of these elevated thoughts was new, or can be affirmed never before to have entered the conceptions of man?

"Whether, also, the sentiment of independence, and the reasons for declaring it, which make so great a portion of the instrument, had been hackneyed in Congress for two years before the 4th of July, 1776, or this dictum of Mr. Adams be another slip of memory, let history say. This, however, I will say for Mr. Adams, that he supported the Declaration with zeal and ability, fighting fearlessly for every word of it. As to myself, I thought it a duty to be, on that occasion, a passive auditor of the opinions of others, more impartial judges than I could be of its merits or demerits. During the debate I was sitting by Doctor Franklin, and he observed that I was writhing a little under the acrimonious criticisms on some of its parts; and it was on that occasion that, by way of comfort, he told me the story of John Thomson, the hatter, and his new sign." (Jefferson's Works, IV. 376.)

The substantial point of difference in these two accounts of the same transaction relates to the action of the committee in designating the person or persons who were to prepare the draft of a Declaration. Mr. Adams states that Mr. Jefferson and himself were appointed a sub-committee to prepare it; Mr. Jefferson states that he alone was directed by the committee to write the Declaration. This question is not important, since Mr. Adams's version does not in the least impair Mr. Jefferson's claim to the authorship of the instrument. The latter, it must be allowed, gracefully parries the criticisms of Mr. Adams, by a noble allusion to the eloquence which sustained his compatriots in the difficulties and embarrassments that surrounded them, and which they did not think of analyzing, for the purpose of tracing the exact originality of its sentiments.

It is proper to add that Mr. Jefferson's account is confirmed by the original manuscript draft of the Declaration, a fac-simile of which was published in 1829, in the fourth volume of his Works, exhibiting the corrections and interlineations made by Dr. Franklin and Mr. Adams in their respective handwritings. These emendations were not important.

The reasons assigned by Mr. Adams for the selection of Mr. Jefferson as the writer of the Declaration are so numerous that it is difficult to determine which of them he intended should be regarded as the principal or decisive one. In the autobiography, he states that there were more reasons than one why Mr. Jefferson was appointed on a committee of such importance. He assigns two reasons: one, Mr. Jefferson's reputation as a writer, and the other, the desire of his Virginia colleagues to have Mr. Jefferson supplant Mr. Richard Henry Lee. In his letter to Mr. Pickering, Mr. Adams gives as the reason why Mr. Jefferson was placed at the head of the committee, that it was "the Frankfort advice to

place Virginia at the head of everything;" but he also adds that Mr. Jefferson brought with him to Congress "a reputation for literature, science, and a happy talent of composition," and that this reputation had then been sustained by writings "remarkable for their peculiar felicity of expression." As in the case of Washington, therefore, it would seem that there were reasons of eminent fitness and qualification for the duty assigned; and certainly the Declaration of Independence itself fully justifies the selection. Few state papers have ever been written with more skill, or greater adaptation to the purposes in view. Whether its sentiments were purely original with its author, or were gathered from the political philosophy which had become familiar to the American mind, through the great discussions of the time, it must forever remain an imperishable monument of his power of expression, and his ability to touch the passions, as well as to address the reason, of mankind. It would be inappropriate to apply to its style the canons of modern criticism. Its statements of political truth, taken in the sense in which they were manifestly intended, can never be successfully assailed. With regard to the passage concerning slavery, we may well conceive that both Northern and Southern men might have felt the injustice of the terrible denunciation with which he charged upon *the king* all the horrors, crimes, and consequences of the African slave-trade, and in which he accused him of exciting the slaves to insurrection, and "to purchase the liberty of which *he* had deprived them by murdering the people upon whom *he* had obtruded them." Mr. Jefferson, in drawing up the list of our national accusations against the king, obviously intended to refer to him as the representative of the public policy and acts of the mother country; and it is true that the imperial government was, and must always remain, responsible for the existence of slavery in the colonies. But this was not one of the grievances to be redressed by the Revolution; it did not constitute one of the reasons for aiming at independence; and there was no sufficient ground for the accusation that the government of Great Britain had knowingly sought to excite general insurrections among the slaves. The rejection of this passage from the Declaration shows that the Congress did not consider this charge to be as tenable as all their other complaints certainly were.

## CHAPTER IV.

JULY, 1776—NOVEMBER, 1777.

CONSEQUENCES OF THE DECLARATION OF INDEPENDENCE.—REORGANIZATION OF THE CONTINENTAL ARMY.—FLIGHT OF THE CONGRESS FROM PHILADELPHIA.—PLAN OF THE CONFEDERATION PROPOSED.

WHEN the Declaration of Independence at length came, it did not in any way change the form of the revolutionary government. It created no institution, and erected no civil machinery. Its political effect has already been described. Its moral effect, both upon the members of the Congress and upon the country, was very great, inasmuch as it put an end alike to the hope and the possibility of a settlement of the controversy upon the principles of the English Constitution, for it made the colonies free, sovereign, and independent states. Men who had voted for such a measure, and who had put their signatures to an instrument which the British Parliament or the Court of King's Bench would have had no difficulty in punishing as treasonable, could no longer continue to feed themselves on "the dainty food of reconciliation."<sup>1</sup> Thenceforward there was no retreat. The colonies might be conquered, overrun, and enslaved; but this, or the full and final establishment of their own sovereignty, were the sole alternatives. The consequence was that the Declaration was followed by a greater alacrity on the part of the whole body of the Congress to adopt vigorous and decisive measures, than had before prevailed among them.

But there was one feeling which the Declaration did not dispel, and another to which it immediately gave rise, both of which were unfavorable to concentrated, vigorous, and effective action on the part of the revolutionary government. The Declaration of Independence did not dissipate the unreasonable and ill-timed

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<sup>1</sup> Washington's Writings, III. 403.

jealousy of standing armies, which gave way, at last, only when the country was in such imminent peril that Washington felt it to be his duty to ask for extraordinary powers to be conferred upon himself. It was followed, too, as an immediate consequence, by that jealousy with regard to state rights, and that adhesion to state interests, which have existed in our system from that day to the present, and are inseparable from it. As the Declaration made the colonies sovereign and independent, and was followed by the formation of state governments, before the creation of any well-defined national system, state sovereignty became at once an ever-present cause of embarrassment to the Congress, in whose proceedings entire delegations sometimes made the interests of the country bend to the interests of their own state, to a mischievous extent.

To explain these observations, I must recur again to the history of the army, and to the efforts of Washington to have the military establishment put into a safe and efficient condition.

After the evacuation of Boston by the British forces, Washington proceeded, at once, with the Continental army to the city of New York, where he arrived on the 13th of April, 1776. The loss of the battle of Long Island on the 27th of August, and the extreme improbability of his being able to hold the city against the superior forces by which it had been invested through the entire summer, made it necessary for him to appeal once more to the Congress for the organization of a permanent army, capable of offering effectual resistance to the enemy. The establishment formed at Cambridge in the autumn previous was to continue for one year only; it was about to be dissolved; and in the month of September, Washington was compelled to abandon the city of New York to the enemy. Before he withdrew from it, he addressed a letter to the President of Congress, on the 2d of September, in which he told that body explicitly that the liberties of the country must, of necessity, be greatly hazarded, if not entirely lost, should their defence be left to any but a permanent standing army; and that, with the army then under his command, it was impossible to defend and retain the city.<sup>1</sup> On the 20th

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<sup>1</sup> Writings of Washington, IV. 72.

of the same month, he again wrote, expressing the opinion that it would be entirely impracticable to raise a proper army, without the allowance of a large and extraordinary bounty.<sup>1</sup>

At length, when he had retreated to the Heights of Haerlem, and found himself surrounded by a body of troops impatient of restraint, because soon to be entitled to their discharge, and turbulent and licentious, because they had never felt the proper inducements which create good conduct in the soldier, he made one more appeal to the patriotism and good sense of the Congress. Few documents ever proceeded from his pen more wise, or evincing greater knowledge of mankind, or a more profound apprehension of the great subject before him, than the letter which he then wrote concerning the reorganization of the army.<sup>2</sup>

Before this letter was written, however, urged by his repeated requests and admonished by defeat, the Congress had adopted a plan, reported by the Board of War, for the organization of a new army, to serve during the war. A long debate preceded its adoption, but the resolves were at length passed on the 16th of September, 1776.<sup>3</sup> They authorized the enlistment of a body of troops, to be divided into eighty-eight battalions, and to be enlisted as soon as possible. These battalions were to be raised by the states; a certain number being assigned to each state as its quota. The highest quota, which was 15, was assigned to the states of Virginia and Massachusetts, respectively. Pennsylvania had 12; North Carolina, 9; Maryland and Connecticut, 8 each; South Carolina, 6; New York and New Jersey, 4 each; New Hampshire, 3; Rhode Island, 2; and Delaware and Georgia, 1 each. The inducements to enlist were a bounty of twenty dollars, and one hundred acres of land to each non-commissioned officer or soldier; and to the commissioned officers, the same bounty in money, with larger portions of land.<sup>4</sup> The states were to provide arms and clothing for their respective quotas, and the ex-

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<sup>1</sup> Writings of Washington, IV. 100.

<sup>2</sup> Letter to the President of Congress, Washington's Writings, IV. 110. September 24, 1776.

<sup>3</sup> Journals, II. 357.

<sup>4</sup> 500 acres to a colonel; 450 to a lieutenant-colonel; 400 to a major; 300 to a captain; 200 to a lieutenant; and 150 to an ensign.

pense of clothing was to be deducted from the pay.<sup>1</sup> Although the officers were to be commissioned by the Continental Congress, each state was to appoint the officers of its own battalions, from the colonel to those of the lowest grade, inclusive. A circular letter was addressed by Congress to each state, urging its immediate attention to the raising of these troops; and a committee of three members of the Congress was sent to the headquarters of Washington, to confer with him on the subject.<sup>2</sup>

Two serious defects in this plan struck the commander-in-chief as soon as it was laid before him; but the resolves had been passed, and passed with difficulty, before he had an opportunity specifically to point out the mistakes. In the first place, by giving the appointment of the officers to the states, any central system of promoting or placing the officers then serving on the Continental establishment according to their characters and deserts was rendered impossible. The resolutions of Congress did not even recommend these officers to the consideration of their respective states. They were left to solicit their appointments at a distance, or to go home and make personal application. Those who chose to do the latter were more likely to get good places than those who remained at their posts; but they were also less likely to be deserving of important commissions than those who stayed with the army. To expect that a proper attention would be paid to the claims of men of real merit under such a system—whether they had or had not been in service before—or that the army when brought together would be found to be officered on a uniform principle, exhibiting an adaptation of character to station, was, in Washington's view, to expect that local authorities would not be influenced by local attachments, and that merit would make its way, in silence and absence, against personal importunity and bold presumption.

But Washington saw no remedy for these evils, except by opening a direct communication with the states, through which he might exert some influence over their appointments. He im-

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<sup>1</sup> Journals, II. 357. Subsequently, by a resolve passed November 12 (1776), the option was given to enlist for the war or for three years, taking away the land bounty from those who enlisted for the latter period only. Ibid. 454.

<sup>2</sup> Ibid.



mediately suggested to the Congress that each state should send a commission to the army, with authority to appoint all the officers of the new regiments. Congress passed a resolve recommending this step to the states, and advising that the commander-in-chief should be consulted in making the appointments; that those officers should be promoted who had distinguished themselves for bravery and attention to their duties; that no officer should be appointed who had left his station without leave; and that all the officers to be appointed should be men of honor and known abilities, without particular regard to their having been in service before.<sup>1</sup> This was but a partial remedy for the defects of the system. Several of the states sent such a commission to act with the commander-in-chief; but many of them were tardy in making their appointments, and finally the Congress authorized Washington to fill the vacancies.

Another and a dangerous defect in this plan was, that the Continental pay and bounty on enlistment were fixed so low that some of the states, in order to fill up their quotas, deemed it expedient to offer a further pay and bounty to their own men. This was done immediately by the states of Connecticut and Massachusetts. The consequence was likely to be, that, if the quotas of some states were raised before the fact became known that other states had increased the pay and the bounty, some regiments would, when the army came together, be on higher pay than others, and jealousy, impatience, and mutiny would be very likely to follow. Knowing that a different pay could not exist in the same army without these consequences, Washington remonstrated with the Governor of Connecticut, arrested the proceedings of the commissioners of that state and of Massachusetts, and prevented them from publishing their terms, until the sense of the Congress could be obtained.<sup>2</sup> That body, on receiving from him another strong representation on the subject, passed a resolve augmenting the pay.

Still the system, notwithstanding these efforts to amend it, worked ill. The appointment of the officers by the states was incapable of being well managed; the pay and bounty, even after

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<sup>1</sup> Journals, II. 403. October 8, 1776.

<sup>2</sup> Writings of Washington, IV. 173.

they were increased, were insufficient; and the whole scheme of raising a permanent army was entered upon at too late a period to be effectually accomplished. Down to the middle of November so little had been done that the entire force on one side of the Hudson, opposed to Howe's whole army, did not exceed two thousand men of the established regiments; while, on the other side, there was a force not much larger to secure the passes into the Highlands.<sup>1</sup> "I am wearied almost to death," said the commander-in-chief, in a private letter, "with the retrograde motion of things, and I solemnly protest that a pecuniary reward of twenty thousand pounds a year would not induce me to undergo what I do; and after all, perhaps, to lose my character, as it is impossible, under such a variety of distressing circumstances, to conduct matters agreeably to public expectation, or even to the expectations of those who employ me, as they will not make proper allowances for the difficulties their own errors have occasioned."<sup>2</sup>

There are few pages in our history so painful as those on which are recorded the complaints extorted from Washington, at this period, by the trials of his situation. That he, an accomplished soldier, who had retired with honor from the late war with France to his serene Mount Vernon; who had left it again to stake life, and all that makes life valuable, on the new issue of his country's independence; who asked no recompense and sought no object but her welfare, should have been compelled to pass into the dark valley of the retreat through New Jersey, with all its perplexities, dangers, and discouragements, its exertions and its reverses, without a powerful and energetic government to lean upon, and with scarcely more than divine assistance to which to turn, presents, indeed, to our separate contemplation, a disheartening and discreditable fact. But no trials are appointed to nations, or to men, without their fruits. The perplexities and difficulties which surrounded Washington in the early part of the Revolution contributed, undoubtedly, to give him that profound civil wisdom, that knowledge of our civil wants, and that influence over the country, which were afterwards so beneficently felt in the establishment of the Constitution. The very weakness of the govern-

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<sup>1</sup> Writings of Washington, IV. 183, 184.

<sup>2</sup> Ibid. 184.

ment which he served became in this manner his and our strength. Without the trials to which it subjected him, it may well be doubted whether we should now possess that security against distracted counsels and clashing interests which exist for us in the character and services of that extraordinary man.

It is not necessary to sketch the scene or to follow the route of Washington's retreat through New Jersey, except as they illustrate the subject of this work—the constitutional history of the country. Its remarkable military story is well known. On the 23d of November, four days after the date of the letter to his brother above quoted, he was at Newark, with a body of troops whose departure was near at hand, and for supplying whose places no provision had been made. The enemy were pressing on his rear, and in order to impress upon Congress the danger of his situation he sent General Mifflin to lay an exact account of it, before them.<sup>1</sup> On the 28th he marched out of Newark in the morning, and Lord Cornwallis entered it on the afternoon of the same day. On the 30th he was at Brunswick, endeavoring, but with little success, to raise the militia, the terms of service of the Jersey and Maryland brigades expiring on that day. On the 1st of December his army numbered only four thousand men, and the enemy were pushing forward with the greatest energy.<sup>2</sup> On the 5th he resolved to march back to Princeton; but neither militia nor regulars had come in, and it was too late to prevent an evil which he had both foreseen and foretold.<sup>3</sup> On the 8th he crossed the Delaware.<sup>4</sup> On the 12th he saw his little handful of men still further decrease; and now, without succors from the government or spirited exertions on the part of the people, the loss of Philadelphia—"an event," said he, "which will wound the heart of every virtuous American"—rose as a spectre in his path.<sup>5</sup> On the 16th, as he moved on, gathering all the energies of his character to parry this deep disgrace, concentrating every force that remained to him towards the defence of the city, and animating and directing public bodies in a tone of authority and command, he once more urged the Congress to discard all reliance upon the militia, to augment the number of the regular troops, and to strain

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<sup>1</sup> Writings, IV. 190.

<sup>4</sup> Ibid. 206.

<sup>2</sup> Ibid. 197.

<sup>5</sup> Ibid. 211.

<sup>3</sup> Ibid. 202.

every nerve to recruit them.<sup>1</sup> Finally—being still in doubt whether Howe did not intend an attack on Philadelphia before going into winter quarters—with less than three thousand men fit for duty, to oppose a well-appointed army of ten or twelve thousand, and surrounded by a population rapidly submitting to the enemy—he felt that the time had come when to his single hands must be given all the military authority and power which the Continental Union of America held in trust for the liberties of the country. On the 20th of December, therefore, he wrote to the President of Congress a memorable letter, asking for extraordinary powers, but displaying at the same time all the modesty and high principle of his character.<sup>2</sup>

To this appeal Congress at once responded, in a manner suited to the exigency. On the 27th of December, 1776, they passed a resolution, vesting in Washington ample and complete power to raise and collect together, in the most speedy and effectual manner from all or any of the United States, sixteen battalions of infantry, in addition to those already voted; to appoint the officers of these battalions; to raise, officer, and equip three regiments of artillery and a corps of engineers, and to establish their pay; to apply to any of the states for such aid of their militia as he might judge necessary; to form such magazines of provisions, and in such places, as he should think proper; to displace and appoint all officers under the rank of brigadier-general; to fill up all vacancies in every other department of the American army; to take, wherever he might be, whatever he might want for the use of the army, if the inhabitants would not sell it, allowing a reasonable price for the same; to arrest and confine persons who should refuse to receive the Continental currency, or were otherwise disaffected to the American cause; and to return to the states of which such persons were citizens their names and the nature of their offences, together with the witnesses to prove them. These powers were vested in the commander-in-chief for the space of six months from the date of the resolve, unless sooner revoked by the Congress.<sup>3</sup>

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<sup>1</sup> Writings, IV. 223.

<sup>2</sup> Ibid. 232.

<sup>3</sup> Journals, II. 475. A committee, at the head of which was Robert Morris, was appointed to transmit this resolve to Washington, and in their letter they said: "We find by these resolves that your excellency's hands will be strength-

The powers thus conferred upon Washington were in reality those of a military dictatorship, and in conferring them the Congress acted upon the maxim that the public safety is the supreme law. They acted, too, as if they were the proper judges of the exigency, and as if the powers they granted were then rightfully in their hands. But it is a singular proof of the unsettled and anomalous condition of the political system of the country, and of the want of practical authority in the Continental government, that, in three days after the adoption of the resolves conferring these powers, the Congress felt it necessary to address a letter to the governors of the states apologizing for this step. Nor was their letter a mere apology. It implied a doubt whether the Continental government possessed a proper authority to take the steps which the crisis demanded, and whether the execution of all measures did not really belong to the states, the Congress having only a recommendatory power. "Ever attentive," their letter declared, "to the security of civil liberty, Congress would not have consented to the vesting of such powers in the military department as those which the enclosed resolves convey to the Continental commander-in-chief, if the situation of public affairs did not require, at this crisis, a decision and vigor which distance and numbers deny to assemblies far removed from each other and from the seat of war." The letter closed by requesting the states to use their utmost exertions to further such levies as the general might direct, in consequence of the new powers given him, and to make up and complete their quotas as formerly settled.'

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ened by very ample powers, and a new reformation of the army seems to have its origin therein. Happy it is for this country that the general of their forces can safely be intrusted with the most unlimited power, and neither personal security, liberty, nor property be in the least degree endangered thereby." In his reply, the general said to the committee: "Yours of the 31st of last month enclosed to me sundry resolves of Congress, by which I find they have done me the honor to intrust me with powers, in my military capacity, of the highest nature, and almost unlimited in extent. Instead of thinking myself freed from all *civil* obligations by this mark of their confidence, I shall constantly bear in mind that, as the sword was the last resort for the preservation of our liberties, so it ought to be the first thing laid aside when those liberties are firmly established. I shall instantly set about the most necessary reforms in the army, but it will not be in my power to make so great a progress as if I had a little leisure time upon my hands." Writings of Washington, IV. 257, 552. <sup>1</sup> Ibid. 551.

Strictly examined, therefore, the position taken by the Congress was, that a crisis existed demanding the utmost decision and vigor; that the measures necessary to meet it, such as the raising of troops and the compulsory levying of supplies, belonged to the states; but that, the state governments being removed from each other and from the seat of war, the Congress confers upon the Continental general power to do things which in reality it belongs to the states to do. In this there was a great inaccuracy, according to all our present ideas of constitutional power. But still the action of the Congress expresses and exhibits their real situation. It contains a contradiction between the true theory of their revolutionary powers and the powers which they could in fact practically exercise. Upon principle, it was just as competent to the Congress to take the steps required by the exigency as it was to adjudge them to the states; and it was just as competent to the Congress to do anything directly as to confer a power to do it on their general. But the jealousies of the states, the habits of the country, and the practical working of the existing institutions, had never permitted the full exercise of the revolutionary powers which properly resided in the hands of the Congress. The true theory of their situation was limited by practical impossibilities, and an escape from contradictions became impossible. It was perceived that the states would neither pass laws or resolves for the summary raising of forces and levying of supplies, nor allow this to be done by committees or commissioners of Congress; but it was believed that they would acquiesce in its being done by Washington, out of respect for his character, for his abilities and his motives, and from conviction that he alone could save the country.

The expectations of the Congress were not disappointed. It was felt throughout the country that such powers could be lodged in the hands of Washington without danger. The states in general acquiesced in the necessity and propriety of this measure, and there was little disposition to encroach upon or to complain of the authority conferred. To this acquiescence, however, there were exceptions.<sup>1</sup>

The period which now followed was a part of the interval

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<sup>1</sup> Writings of Washington, IV. 551.

during which the Articles of Confederation were pending in Congress. We have seen that the plan of a confederation was reported to that body in July, 1776, and finally adopted for recommendation to the states in November, 1777. But soon after the extraordinary powers had been conferred upon Washington the attendance of the members began to diminish, and several of the most eminent and able men who had hitherto served retired from Congress. In January, 1777, there were no delegations present from the states of Delaware and New York ;<sup>1</sup> and in February the absence of many distinguished men, whose counsels had been of vast importance, made a striking deficiency. The formation of the state governments, and the local affairs of the states, absorbed for a time, with a few important exceptions, the best civil talent in the country.<sup>2</sup>

While the personal efficiency and wisdom of the Congress thus sensibly declined, no change took place in the nature of their powers, or in their relations to the states, that would impart greater vigor to their proceedings. The delegations of many of the states were renewed in the winter of 1776-7 ; but there was a great diversity, and in some cases a great vagueness, in their instructions.<sup>3</sup>

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<sup>1</sup> Journals, III. 35.

<sup>2</sup> "We have now to lament," said Robert Morris, in a private letter to Washington, under date of February 27th, 1777, "the absence from the public councils of America of Johnson, Jay, R. R. Livingston, Duane, Deane, W. Livingston, Franklin, Dickinson, Harrison, Nelson, Hooper, Rutledge, and others not less conspicuous, without any proper appointments to fill their places, and this at the very time they are most wanted, or would be so, if they had not very wisely supplied the deficiency by delegating to your excellency certain powers that they durst not have intrusted to any other man. But what is to become of America and its cause if a constant fluctuation is to take place among its counsellors, and at every change we find reason to view it with regret?" Writings of Washington, IV. 340, note.

<sup>3</sup> Massachusetts, in December, 1776, renewed the credentials of John Hancock, Samuel Adams, John Adams, Robert Treat Paine, Elbridge Gerry, Francis Dana, and James Lovell, giving power to any three or more of them, with the delegates from the other American states, to concert, direct, and order such further measures as shall to them appear best calculated for the establishment of right and liberty to the American states, upon a basis permanent and secure against the power and art of the British administration ; for prosecuting the present war, concluding peace, contracting alliances, establishing commerce, and guarding against any future encroachments and machinations of their enemies : with

In such a state of things—with no uniform rule prescribing the powers of the Congress, and with some uncertainty in that body itself with regard to its authority to confer upon the commander-in-chief the powers with which he was now invested—however general might be the readiness of the country to acquiesce in their necessity, it is not surprising that state jealousy was sometimes aroused, or that it should have been unreasonable in some of its manifestations.

A striking instance of this jealousy occurred upon the occasion of a proclamation issued by Washington at Morristown, on the 25th of January, 1777. Sir William Howe had published a proclamation in New Jersey, offering protection to such of the inhabitants as would take an oath of allegiance to the king. Many of the substantial farmers of the country had availed themselves of

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power to adjourn, etc. (Journals, IV. 14). New Hampshire in the same month sent William Whipple, Josiah Bartlett, and Mathew Thornton, making any one of them a full delegation, without any other instructions than "to represent" the state in the Continental Congress for one year, and allowing only two of them to attend at a time (Ibid. 41). Virginia in the same month appointed Mann Page, in the room of George Wythe, with the same general instructions "to represent" the state (Ibid. 42). North Carolina in the same month appointed William Hooper, Joseph Hewes, and Thomas Burke, and invested them "with such powers as may make any act done by them, or any of them, or consent given in the said Congress in behalf of this state, obligatory upon every inhabitant thereof" (Ibid. 87). South Carolina chose Arthur Middleton, Thomas Hayward, Jr., and Henry Laurens, with power "to concert, agree to, and *execute* every measure which one or all of them should judge necessary for the defence, security, or interest of this state in particular, and of America in general" (Ibid. 53). Connecticut sent Roger Sherman, Samuel Huntington, Eliphalet Dyer, Oliver Wolcott, Richard Law, and William Williams, "to consult, advise, and resolve upon measures necessary to be taken and pursued for the defence, security, and preservation of the rights and liberties of the said United States, and for their common safety;" but requiring them "of such their proceedings and resolves to transmit authentic copies from time to time to the General Assembly of this state" (Ibid. 5). Of the other states, Pennsylvania, Rhode Island, New York, New Jersey, Maryland, and Georgia, which renewed their delegations somewhat later in the year, instructed them simply "to represent" the state in the Continental Congress; and Delaware empowered its delegates, on behalf of the state, "to concert, agree to, and execute any measure which they, together with a majority of the Continental Congress, should judge necessary for the defence, security, interest, and welfare of that state in particular, and America in general" (Ibid. 64, 815, 171, 169, 395, 54, 403, 86).



this offer, and had received protection from the British general. The English and Hessian troops, however, made no distinction between friends and foes, but frequently committed great outrages both upon person and property. The resentment of the population would have restored them to the patriot side; but many who had taken the oath of allegiance felt, or affected, in consequence, scruples of conscience.

Washington therefore issued a counter-proclamation, commanding all persons who had received the enemy's protection to repair to headquarters, or to some general officer of the army, and to surrender their protections and take an oath of allegiance to the United States; allowing thirty days for those who preferred to remain under the protection of Great Britain to withdraw within the enemy's lines. This was considered in some quarters as an undue exercise of power. The idea of an oath of allegiance to the United States, before the Confederation was formed, was regarded by many as an absurdity. Allegiance, it was said, was due exclusively to the state of which a man was an inhabitant; the states alone were sovereign; and it was for each state, not for the United States, which possessed no sovereignty, to exact this obligation. The Legislature of New Jersey were disposed to treat Washington's proclamation as an encroachment on their prerogatives; and one of the delegates of that state in Congress denounced it as improper.<sup>1</sup>

This feeling was shared by other members; but it is not to be doubted that the proceeding was a legitimate exercise of the authority vested in the commander-in-chief. He had been expressly empowered to arrest and confine persons disaffected to the American cause; and the requiring them to attend at his headquarters was clearly within the scope of this authority. Moreover, although no confederation or political union of the states had been formed under a written compact, yet the United States were waging war as a government regularly constituted by its representatives in a congress, for the very purpose of carrying on such war. They had an army in the field, whose officers held Continental commissions,

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<sup>1</sup> This was Mr. Abraham Clark, one of the signers of the Declaration of Independence. Mr. Sparks has preserved a curious letter written by this gentleman on the subject. Writings of Washington, IV. 298.

and were paid by a Continental currency. They were exercising certain of the attributes of sovereignty as a belligerent power; and in that capacity they had a complete right to exact such an obligation not to aid the enemy as would separate their friends from their foes. It was a military measure; and the tenor of the proclamation shows that Washington exacted the oath in that relation. To pause at such a moment, and to consider nicely how much sovereignty resided in each of the states, and how much or how little belonged to the United States, was certainly a great refinement. But it marks the temper of the times, and the extreme jealousy with which all Continental power and authority were watched at that period.<sup>1</sup>

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<sup>1</sup> The whole of this alarm evidently arose from the use of the words "oath of allegiance" in Washington's proclamation. Probably this phrase was used by him as a convenient description of the obligation which he intended to exact. He did not use it as a jurist, but as a general and a statesman. In a letter written by him on the 5th of February (1777) to the President of Congress, desiring that body to urge the states to adopt an oath of fidelity, he said: "From the first institution of civil government, it has been the national policy of every precedent state to endeavor to engage its members to the discharge of their public duty by the obligation of some oath;" and he then observes, with his characteristic wisdom, that "an oath is the only substitute that can be adopted to supply the *defect of principle*." He advised that every state should fix upon some oath or affirmation of allegiance, to be tendered to all the inhabitants without exception, and to outlaw those that refused it (Writings, IV. 311, 312). Afterwards, when the Legislative Council of New Jersey—where some of the people had refused to take the oath required by his proclamation—applied to him to explain the nature of the oath, and to be furnished with a copy of it, that they might know whether it was the oath prescribed by the General Assembly of that state, he informed them that he had prescribed no form, and had reverted to none prescribed by them; that his instructions to the brigadiers who attended to that duty were, to insist on nothing more than an obligation *in no manner to injure the states*; and that he had left the form to his subordinates; but that if he had known of any form adapted to the circumstances of the inhabitants, he would certainly have ordered it (Ibid. 319, note). This explanation makes it quite certain that what Washington called in his proclamation an oath of allegiance was merely a military exaction of an obligation in favor of a belligerent power against the enemy; and his advice on the subject of a general civil oath of allegiance, to be exacted by the states, shows that he understood the niceties of the subject as well as any casuist in or out of Congress. This topic may be dismissed by reverting here to the fact, that in February, 1778, Congress prescribed an oath or affirmation, to be taken by the officers of the

We have seen that the powers conferred upon Washington authorized him to raise, in the most speedy and effectual manner, sixteen battalions of infantry, in addition to those before voted by Congress, three regiments of artillery, and a corps of engineers; and also to apply to any of the states for the aid of their militia when wanted.<sup>1</sup> At the period when he addressed himself to this great undertaking of forming a new army, for the third time, the existing force which he had with him in and around New Jersey was about to be dissolved. The additional regiments of the regular line were to be raised by the states, and upon them alone could he depend for the supply of a new army with which to commence the campaign in the spring of 1777. He had labored, he said, ever since he had been in the service, to discourage all kinds of local attachments and distinctions of country, denominating the whole by the greater name of AMERICAN; but he had found it impossible to overcome prejudices.

Two causes especially embarrassed his efforts in the formation of the new army; and both of them show how powerful were the centrifugal forces of our system at that period, and how little hold that great central name had taken upon the people of the different states. One of these causes was the persistence of some of the states in giving extra bounties to encourage enlistments into their quotas of the original eighty-eight battalions not yet raised. The bounty allowed by Congress was twenty dollars to every soldier enlisting into the new establishment for three years or during the war. The additional bounty offered by Massachusetts was sixty-six dollars and two thirds. There was thus an inducement of eighty-six dollars and two thirds offered to the men then in the service of the United States, not to re-enlist in their old regiments, as fast as their term of service expired, but to go to Massachusetts and enlist in the fresh quotas which were form-

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army, and all others holding office under Congress, which was simply a renunciation of allegiance to the King of Great Britain, an acknowledgment of the independence of the United States, and a promise to support, maintain, and defend them against King George III. and his successors, and to serve the United States in the office mentioned with fidelity, and the best skill and understanding of the party taking the oath. Journals, IV. 49.

<sup>1</sup> Ante, p. 69.

ing in that state, and which were to be afterwards mustered into the Continental service. The same inconsiderate and unpatriotic policy was pursued in all the Eastern States, and before the spring opened the consequences began to be felt in the state of the new Continental battalions which Washington was endeavoring to procure from some of the Middle States, and in which he would not sanction the allowance of an extra bounty, regarding it as an indirect breach of the union, and of the agreement entered into by the delegates of the states in Congress to give a bounty of twenty dollars only for service in the Continental army.<sup>1</sup> The month of April arrived, and he had not received a man of the new levies, except a few hundreds from Jersey, Pennsylvania, and Virginia, while the few old regiments which remained, after the dissolution of the army in January, were reduced to a handful of men, the enemy being in great force, and making every preparation to seize upon Philadelphia.

Nor did the allowance of these irregular bounties help the states in raising the old levies, as had been anticipated. They rather caused the soldiers to set a high price upon themselves, and to hold back from enlisting; while the second cause to which I have alluded as embarrassing the commander-in-chief was a great hinderance to his efforts to plan and carry out a campaign having for its object the general benefit of the whole Union.

This cause was the inability of many local authorities to comprehend the necessity of such a campaign. Washington was, at this period, harassed by numerous applications to allow the troops, which had been raised in the states for the service of the continent, to remain for the defence of particular neighborhoods against incursions of the enemy. Nothing, he said on one of these occasions, could exceed the pleasure which he should feel, if he were able to protect every town and every individual on the continent. But as this was a pleasure which he never should realize, and as the Continental forces were wanted to meet and counteract the main designs of the enemy on the principal theatre of the war, he could not consent to divide them and detach them to every point where the enemy might possibly attempt an impression; "for

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<sup>1</sup> Letter to General Knox, February 11, 1777. Writings, IV. 316.

that," he added, "would be in the end to destroy ourselves and subjugate our country."<sup>1</sup>

From the operation of these and other causes connected with the political system of the country, the army with which Washington was obliged to take the field, in the spring of 1777, did not exceed five thousand seven hundred and thirty-eight effective men, exclusive of a small body of cavalry and artillery.<sup>2</sup> The consequence was, a necessary reliance upon militia, to a great extent, throughout that summer. The battle of the Brandywine, fought with an effective force of only eleven thousand men, including militia, against a thoroughly disciplined army of fifteen thousand British and Hessian troops, and fought for the city of Philadelphia as a stake, was lost on the 11th of September.<sup>3</sup> The Congress broke up on the 18th. Sir William Howe took possession of the city on the 26th; and on the 27th the Congress reassembled at Lancaster. In a few days they removed to Yorktown, where their sessions continued to be held for several months.

The position in which they found themselves, amid the dark clouds which lowered around their cause, seems to have recalled to their recollection the Articles of Confederation, which had lain slumbering upon their table since the 8th of April. On that day they had resolved that the report should be taken into consideration on the following Monday, and that two days in each week should be employed on the subject, until it had been wholly discussed. When the Monday came, it was postponed; and it was only after they had been driven from Philadelphia by the approach of the enemy that they seem to have fully realized the fact that, without a more perfect union and a more efficient gov-

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<sup>1</sup> Letter to Governor Trumbull, May 11, 1777. Writings, IV. 413. See also Letter to Major-General Stephen, May 24, 1777. Ibid. 431.

<sup>2</sup> Marshall's Life of Washington, III. 102.

<sup>3</sup> The exact numbers of the troops on both sides, in this battle, are not known. Sir William Howe estimated the American force at 15,000, including militia; and this number is given in the *Annual Register*. But the effective force of the American army was always, at this period of the war, considerably less than the total number; and Chief-Justice Marshall states it to have been, on this occasion, 11,000, including militia. The *Annual Register* gives the number of the royal army brought into action as 15,000. Marshall supposes it to have been 18,000 when they landed on the shores of the Chesapeake. Marshall's Life of Washington, III. 140, 141. *Annual Register* for 1777, XX. 127.

ernment, the country could not be saved. As soon as they had reassembled at Yorktown, after the urgent business of the moment had been attended to, they passed a resolve, on the 2d of October, that the Articles of Confederation be taken into consideration the next day, at eleven o'clock. The discussion did not actually commence, however, until the 7th of October; but from that day it was continued until the 17th of November, when the articles, as they afterwards went into operation, were adopted for recommendation to the states, and a circular letter was addressed to the several legislatures, submitting the plan of a confederacy, and urging its adoption.

We are now approaching the period when the American people began to perceive that something more was necessary to their safety and happiness than the formation of state governments; when they found, or were about to find, that some digested system of national government was essential to the great objects for which they were contending; and that, for the formation of such a government, other arrangements than the varying instructions of different colonies or states to a body of delegates were indispensable. The previous illustrations, drawn from the civil and military history of the country, have been employed to show the character and operation of the revolutionary government, the end of which is drawing near. For we have seen that the great purpose of that government was to secure the independence of each of these separate communities or states from the crown of Great Britain; that it was instituted by political societies having no direct connection with each other except the bond of a common danger and a common object; and that it was formed by no other instrumentality, and possessed no other agency, than a single body of delegates assembled in a congress. For certain great purposes, and in order to accomplish certain objects of common interest, a union of the people of the different states had indeed taken place, bringing them together to act through their representatives; but this union was now failing, from the want of definite powers; from the unwillingness of the people of the country to acquiesce in the exercise of the general revolutionary powers with which it was impliedly clothed; and from the want of suitable civil machinery. In truth, the revolutionary government was break-

ing down, through its inherent defects, and the peculiar infelicity of its situation. Above all, it was breaking down from the want of a civil executive to take the lead in assuming and exercising the powers implied from the great objects for which it was contending. Its legislative authority, although defined in no written instruments or public charters, was sufficient, under its implied general powers, to have enabled it to issue decrees directing the execution, by its own agents, of all measures essential to the national safety. But this authority was never exercised, partly because the states were unwilling to execute it, but chiefly because no executive agency existed to represent the Continental power and to enforce its decrees.

It is a singular circumstance that, while the revolutionary government was left to conduct the great affairs of the continent through the mere instrumentality of a congress of delegates, and was thus failing for the want of departments and powers, the states were engaged in applying those great principles in the organization and construction of popular governments, under which they may be formed with rapidity and ease, and which are capable of the most varied adaptation to the circumstances and wants of a free people.

The suppression of the royal authority throughout the colonies, by virtue of the resolve of the Continental Congress passed on the 10th of May, 1776, rendered necessary the formation of local governments, capable at once of answering the ends of political society, and of continuing without interruption the protection of law over property, life, and public order. Fortunately, as we have seen, the previous constitutions of all the colonies had accustomed the people, to a great extent, to the business of government; and when the recommendation of the Continental Congress to the several colonies to adopt such governments as would best conduce to their happiness and safety was made immediately after the first effusion of blood, it was addressed to civil societies, in which the people had, in different modes, been long accustomed to witness and to exercise the functions of legislation, and in all of which there were established forms of law, of judicature, and of executive power.

The new political situation in which they now found them-

selves required, in many of the colonies, but little departure from these ancient institutions. The chief innovation necessary was, to bring into practical working the authority of the people, in place of that of the crown of England, as the source of all political power. The changes requisite to effect this were of course to be made at once; the materials for these changes existed everywhere, in the representative institutions which had been long a part of the system of every colony since the first settlement of the country. Thus, as we have seen, in all the provincial, the proprietary, and the charter governments, the freemen of the colony had been accustomed to be represented in the government, in some form; and although those governments, with a few exceptions, were under the direct or indirect restraint of the crown, and could all be reached and controlled by the exercise of arbitrary power, the practice of representation, through popular elections, was everywhere known and familiar. The old constitutions of some of the colonies had also been highly democratic, admitting an election of the executive, as well as of the legislature, directly by the people;<sup>1</sup> while, in others, where the executive was appointed by the crown, the second or less numerous branch of the legislature had been elected by the people, either directly, or indirectly through the popular assembly. The foundations, therefore, for popular governments existed in all the colonies, and furnished the means for substituting the new source of political power, the will of the people, in the place of that of an external sovereign.

But there were other materials, also, for the formation of regular and balanced governments, with nearer approaches to perfection and with far greater completeness than a mere democracy can afford to any people, however familiar they may be with the exercise and the practice of government. The people of these colonies had been so trained as to be able to apply those principles in the construction and operation of government which enable it to work freely, successfully, and wisely, while resting on a popular basis. They were able to see that the whole of what is meant and understood by government is comprehended in the existence and due operation of legislative, executive, and judicial powers.\* They had lived under political arrangements, in which

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<sup>1</sup> Connecticut and Rhode Island.

\* See John Adams's letter to R. H. Lee.



these powers had been distributed so as to keep them for the most part distinct from each other, and so as to mark the proper limitations of each. If, in some instances, the same individuals had exercised more than one of these powers, the distinctions between the departments, and the principles which ought to regulate such distinctions, had become known. The people of the colonies, in general, therefore, saw that nothing was so important, in constructing a government with popular institutions, as to balance each of these departments against the others, so as to leave to neither of them uncontrolled and irresponsible power. In general, too, they understood, and had always been accustomed to the application of that other fundamental principle, essential to a well-regulated liberty, the division of the legislative power between two separate chambers, having distinct origins and of distinct constructions.<sup>1</sup>

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<sup>1</sup> Three of the colonies, namely, New Hampshire, South Carolina, and Virginia, proceeded to form constitutions of government before the Declaration of Independence was adopted, under a special recommendation given to each of them by Congress, in the latter part of the year 1775, addressed to the provincial convention, advising them "to call a full and free representation of the people, to establish such a form of government as in their judgment will best promote the happiness of the people, and most effectually secure good order in the province during the continuance of the present dispute between Great Britain and the colonies" (Journals, I. 231, 235, 279). In New Hampshire this suggestion was carried out in January, 1776, by the representatives of the people, who had first met as a provincial congress of deputies from the towns, and then assumed the name and authority of a "house of representatives," or "assembly" of the colony; in which capacity they proceeded to elect twelve persons from the several counties, to form a distinct branch of the legislature, as a council. The council were to elect their own presiding officer. All acts and resolves, to be valid, were required to pass both branches; all public officers, except clerks of courts, were to be appointed by the two houses, and all money bills were to originate in the popular branch. In case the dispute with Great Britain should continue longer than the year 1776, and the general Congress should not give other instructions, it was provided that the council should be chosen by the people of each county, in a mode to be prescribed by the council and house. This form of government continued through the Revolution, and until the year 1790, when a new constitution was formed (Pitkin's History of the United States, II. 294). In South Carolina the Provincial Congress likewise resolved itself a "general assembly," and elected a legislative council from their own body. By these two bodies, acting jointly, an executive, styled a president, a commander-in-chief, and a vice-president, were chosen. The legislative authority

But none of these ideas were applied, or were yet thought of being applied, to the construction of a government for the United States; and it is therefore at this period that we are to observe

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was vested in the president and the two houses. The judiciary were elected by the two houses and commissioned by the president, and were to hold their offices during good behavior, subject to removal on the address of both houses. This form of government remained until June, 1790, when a new constitution was formed by a convention. On the 15th of May, 1776, the Provincial Convention of Virginia proceeded to prepare a declaration of rights and a constitution. The latter declared that the legislative, executive, and judiciary departments ought to be distinct and separate, and divided the legislative department into two branches, the house of delegates and the senate, to be called "the General Assembly of Virginia." The members of the house of delegates were chosen from each county, and one from the city of Williamsburg, and one from the borough of Norfolk. The senate consisted of twenty-four members, chosen from as many districts. A governor and council of state were chosen annually by joint ballot of both houses. The legislature appointed the judges, who were commissioned by the governor, and held their offices during good behavior. Massachusetts was one of the colonies whose situation rendered it necessary to defer the formation of a constitution for several years. The transition in that colony from the government of the king to a government of the people took place in the latter part of the year 1774 and the beginning of 1775. The occurrences which led the House of Representatives to resolve themselves into a provincial congress have been stated in the text of a previous chapter (ante, p. 26). This body, which assumed the control of the affairs of the colony in October, 1774, first assembled at Cambridge, where they continued in session until the 10th of December, and then dissolved themselves, having first appointed a *Committee of Safety* to manage the public concerns, until a new congress should be assembled. On the 1st of February, 1775, a new provincial congress met at Cambridge, adjourned to Concord, and thence to Watertown, and were dissolved on the 23d of May. On the 16th of May they wrote to the Continental Congress, requesting their advice on "taking up and exercising the powers of civil government." In their letter they said, "As the sword should in all free states be subservient to the civil powers, and as it is the duty of the magistrate to support it for the people's necessary defence, we tremble at having an army, although consisting of our own countrymen, established here, without a civil power to provide for and control them." On the 9th of June the Continental Congress passed a resolve, recommending the election of a new General Assembly, under the directions of the Provincial Congress, and that the assembly, when chosen, should exercise the powers of government until a governor of the king's appointment would consent to govern the colony according to its charter (Journals, I. 115). Meanwhile a third Provincial Congress met at Watertown, on the 31st of May, and sat until the 19th. The new General Assembly of the

the slow progress making, through disaster and trial, to those great discoveries which led the way to the Constitution, and that we are to mark the first of those failures by which the people of America learned the bitter wisdom of experience. For the fate of the revolutionary government presents the first illustration in our history of the complete futility of a federative union whose operation as a government should consist merely in agreeing upon measures in a general council, leaving the execution of those measures to the separate members of the confederacy. But this first illustration, we shall soon see, was not sufficient to establish this truth in the convictions of the American people.

Another and a severer trial awaited them. They were not only to be taught once more that a mere federative union was a rope of sand, but they were also to be taught that a government instituted upon this principle for the purposes of a war, in which the separate members of the confederacy had a common interest, would not answer the exigencies of a country like this in time of peace. They were to learn, by a trying experience, that the vast concerns of peace are far more complex than the concerns of war; that there were important functions of government to be discharged upon this continent, which only national power and national authority can accomplish, and that those functions are essential, not only to the prosperity and happiness of this nation, but to the continued existence of republican liberty within the states them-

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Province, called "the General Court," after its ancient usage, met in the mode provided by the charter, and elected a council. These two branches continued to administer the government, as nearly in the spirit of the charter as might be, without a governor, until 1780, when a convention was called and a constitution framed, similar in all its main features to the present constitution of the state. The constitutions of the other states were formed under the general recommendation of the resolve of Congress of May 10th, 1776, addressed to all the colonies, which contemplated the formation of permanent governments, and dissolved the allegiance of the people to the crown of Great Britain. The constitutions of New Jersey, Maryland, Delaware, and North Carolina were formed in 1776, and that of New York in April, 1777; all having three branches, the legislative, the executive, and the judiciary, and all having a legislature consisting of two houses. The constitution of Georgia was formed in 1789, after the same general model. That of Pennsylvania was formed in 1776, with a legislature consisting of a single branch, but with the like division of the legislative, executive, and judicial departments.

selves. They were to learn this through a state of things verging upon anarchy; amid the decay of public virtue, the conflict of sectional interests, and the almost total dissolution of the bands by which society is held together. In this state of things was to be at last developed the fundamental idea on which the Constitution of the United States now rests—the political union of the *people* of the United States for certain limited purposes, as distinguished from a union of the *states* of which they are citizens.

We have, therefore, now reached the first stage in the constitutional history of the country. What has thus far been stated comes to a single point, the earliest great illustration of the radical defects in a purely federative union. The next stage which succeeds presents the second illustration of this important truth.

## CHAPTER V.

NOVEMBER, 1777—MARCH, 1781.

### ADOPTION OF THE ARTICLES OF CONFEDERATION.—CESSIONS OF WESTERN TERRITORY.—FIRST POLITICAL UNION OF THE STATES.

WE have now to examine the period which intervened between the recommendation of the Confederation by Congress, in November, 1777, and its final adoption by all the states, in March, 1781, a period of three years and a half. The causes which protracted the final assent of the states to the new government, and the mode in which the various objections were at length obviated, are among the most important topics in our constitutional history. But, before they are examined, the order of events by which the Confederation finally became obligatory upon all the states should here be stated.

The last clause of the Articles of Confederation directed that they should be submitted to the legislatures of all the states to be considered; and if approved of by them, they were advised to authorize their delegates to ratify the instrument in Congress; upon which ratification it was to become binding and conclusive. On the 20th of June, 1778, a call was made in Congress for the report of the delegations on the action of their several states, and on the 26th of the same month a form of ratification was adopted for signature. On the 9th of July the ratification was signed by the delegates of eight states: New Hampshire, Massachusetts, Rhode Island, Connecticut, New York, Pennsylvania, Virginia, and South Carolina. North Carolina ratified the Articles on the 21st of July; Georgia on the 24th; New Jersey on the 26th of November; Delaware on the 5th of May, 1779; Maryland on the 1st of March, 1781. On the 2d of March, 1781, Congress met under the Confederation.

Undoubtedly one of the causes which deferred the full adop-

tion of the Confederation to so late a period after it was proposed was the absence from Congress of many of the most important and able men, whose attention had hitherto been devoted to the affairs of the continent, but who began to be occupied with local affairs soon after the extraordinary powers were conferred upon Washington. In October, 1777, Hancock left the chair of Congress for an absence of two months; and the votes on a resolution of thanks to him for his services as presiding officer show a great paucity of talent in Congress at that moment.<sup>1</sup> Twenty-two members only were present, and of these the only names much known to fame, at that time or since, were those of Samuel Adams, John Adams, and Elbridge Gerry of Massachusetts, the two Lees of Virginia, Hayward and Laurens of South Carolina, and Samuel Chase of Maryland. Franklin, Arthur Lee, and Silas Deane were then in France. Patrick Henry was Governor of Virginia. Mr. Jefferson was in the Legislature of Virginia, having left Congress in September, in order, as he has himself recorded, to reform the legislation of the state, which, under the royal government, was, he says, full of vicious defects.<sup>2</sup> Mr. Madison was also in the legislature of his native state, a young man of great promise, but unknown at that time as a continental statesman. He entered Congress in March, 1780.

In the year 1778, when the delegations were called upon for reports on the action of their several states upon the Confederation, and when the first objections to the Articles were to be encountered, Hancock had returned to Congress. Samuel Adams and Elbridge Gerry were among his colleagues from Massachusetts. John Adams was in Europe, as Commissioner of the United States to the court of France. Dr. Franklin was still abroad. Richard Henry Lee of Virginia, Laurens and Hayward of South Carolina,

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<sup>1</sup> Hancock retired on the 31st of October, for a short absence, after an unremitted service of two years and five months in the chair. A vote of thanks was moved, as soon as he had concluded his address; but before the question was put, it was moved "to resolve, as the opinion of Congress, that it is improper to thank any president for the discharge of the duties of that office;" and it is a curious fact that on this motion the states were equally divided. The previous motion was then put, and five states voted in the affirmative, three in the negative, and the delegation of one state was divided. Journals, III. 465-467.

<sup>2</sup> Writings of Jefferson, I. 29.

Roger Sherman, Samuel Huntington, and Oliver Wolcott of Connecticut, and Robert Morris of Pennsylvania, were present. The rest of the members, with one brilliant exception, were not men of great distinction, influence, or capacity. That exception was Gouverneur Morris, who came into Congress in January of this year, with a somewhat remarkable youthful reputation, acquired in the public councils of New York.

When this Congress is compared with that of the year 1776, and it is remembered that the Declaration of Independence bears the names of John Adams and Robert Treat Paine of Massachusetts, Francis Hopkinson of New Jersey, Benjamin Rush and Dr. Franklin of Pennsylvania, Cæsar Rodney of Delaware, Samuel Chase of Maryland, George Wythe, Thomas Jefferson, and Benjamin Harrison of Virginia, William Hooper of North Carolina, and Edward Rutledge and Arthur Middleton of South Carolina—none of whom were now present—we perceive at once a striking difference in the two bodies. This difference was not unobserved by those who were then deeply interested in watching the course of public affairs. More than once it filled Washington with dark forebodings;<sup>1</sup> and in the early part of the year 1778 it had attracted the notice of Hamilton, whose vigilant comprehension surveyed the whole field of public affairs, and detected the causes of every danger that threatened the health of the body politic.<sup>2</sup>

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<sup>1</sup> Writings of Washington, V. 326, 327, 350.

<sup>2</sup> "America once had a representation that would do honor to any age or nation. The present falling off is very alarming and dangerous. What is the cause? and how is it to be remedied? are questions that the welfare of these states requires should be well attended to. The great men who composed our first council—are they dead, have they deserted the cause, or what has become of them? Very few are dead, and still fewer have deserted the cause: they are all, except the few who still remain in Congress, either in the field, or in the civil offices of their respective states; far the greater part are engaged in the latter. The only remedy, then, is to take them out of these employments, and return them to the place where their presence is infinitely more important. Each state, in order to promote its own internal government and prosperity, has selected its best members to fill the offices within itself, and conduct its own affairs. Men have been fonder of the emoluments and conveniences of being employed at home; and local attachment, falsely operating, has made them more provident for the particular interests of the states to which they belonged than for the common interests of the Confederacy. This is a most pernicious mistake,

The objections made by the legislatures of several of the states to the Articles of Confederation were found, when examined, to consist almost entirely of propositions for mere verbal amendments, chiefly for the purpose of rendering the instrument more clear. All of these amendments were rejected. Some of the states objected to the rule for apportioning the taxes and forces to be raised by the states for the service of the Union; but Congress rejected every proposition to alter it, as it was believed to be impossible that any other rule should be agreed upon.

But there was an objection made by the state of New Jersey which should be particularly noticed here, because it foreshadowed one great idea which the Constitution of the United States afterwards embodied. This objection was, that the Articles of Confederation contained no provision by which the foreign trade of the country would be placed under the regulation of Congress. The sixth of the Articles of Confederation declared that no state should levy any imposts or duties which might interfere with any stipulations entered into by the United States with any foreign power, pursuant to the treaties already proposed to the courts of France and Spain; while the ninth article declared that no treaty of commerce should be made by the United States whereby the legislative power of the respective states should be restrained from imposing such imposts and duties on foreigners as their own people were subjected to, or from prohibiting the exportation or importation of any species of goods or commodities whatsoever. The effect of these provisions was simply to restrain the states

and must be corrected. However important it is to give form and efficiency to your interior constitutions and police, it is infinitely more important to have a wise general council; otherwise a failure of the measures of the Union will overturn all your labors for the advancement of your particular good, and ruin the common cause. You should not beggar the councils of the United States to enrich the administration of the several members. Realize to yourself the consequences of having a Congress despised at home and abroad. How can the common force be exerted, if the power of collecting it be put in weak, foolish, and unsteady hands? How can we hope for success in our European negotiations, if the nations of Europe have no confidence in the wisdom and vigor of the great Continental government? This is the object on which their eyes are fixed; hence it is, America will derive its importance or insignificance in their estimation." Letter by Hamilton to George Clinton, written from the headquarters of the army, February 13, 1778. Writings of Washington, V. 508.



from laying imposts which would interfere with the then proposed treaties; in all other respects the foreign trade of each state was left to be regulated by state legislation.

The legislature of New Jersey, in a very able memorial, laid before Congress on the 25th of June, 1778, declared that the sole and exclusive power of regulating the trade of the United States with foreign nations ought to be clearly vested in the Congress, and that the revenue arising from duties and customs ought to be appropriated to the building and support of a navy for the protection of trade and the defence of the coasts, and to other public and general purposes, for the common benefit of the states. They suggested that a great security would be derived to the Union from such an establishment of a common and mutual interest.<sup>1</sup> But this suggestion was both premature and tardy. It was premature because the states had not yet learned that their control over foreign commerce must be surrendered, if they would avoid the evils of perpetual conflict with each other; and it came too late, because the Articles of Confederation were practically incapable of amendment at the period when the suggestion was made.<sup>2</sup>

The great obstacle, however, to the adoption of the Confederation, which delayed the assent of several of the smaller states for so long a period, was the claim of some of the larger states to the vacant lands lying within what they considered their rightful

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<sup>1</sup> Journals, IV. 269, 270. This wise and well-considered document contained many other very important suggestions, among which was that of an oath, test, or declaration, to be taken by the delegates in Congress previous to their admission to their seats. "It is indeed to be presumed," said the memorial, "that the respective states will be careful that the delegates they send to assist in managing the general interests of the Union take the oaths to the government from which they derive their authority; but as the United States, collectively considered, have interests as well as each particular state, we are of opinion that some test or obligation, binding upon each delegate while he continues in the trust, to consult and pursue the former as well as the latter, and particularly to assent to no vote or proceeding which may violate the general confederation, is necessary. The laws and usages of all civilized nations evince the propriety of an oath on such occasions, and the more solemn and important the deposit the more strong and explicit ought the obligation to be."

<sup>2</sup> Three states only voted in favor of adopting any of the suggestions made by New Jersey; six voted against them, and one was divided. Journals, IV. 272.

boundaries. The boundaries of the great states, as fixed by their charters derived from the crown of England, extended, in terms, "to the South Sea;" and each of these states, as successor, by the Revolution, to the crown, with regard to territorial sovereignty, claimed to own both the jurisdiction and the property of all the crown lands within its limits. This claim was strenuously resisted by Rhode Island, Delaware, New Jersey, and Maryland. They insisted that Congress ought to have the right to fix the boundaries of the states whose charters stretched to such an indefinite extent into the western wilderness, and that the unoccupied lands ought to be the property of the whole Union; since, if the independence of the country should be finally established, those lands would have been conquered from the crown of England by the common blood and treasure of all the states. The effect of a tacit recognition of the claims of the great states upon the welfare of such a state as Maryland, through the absence from the Articles of Confederation of any provision on the subject, was strikingly exhibited by its legislature in certain instructions to their delegates in Congress, which were laid before that body on the 21st of May, 1779. They pointed out two consequences likely to result from a confirmation of the claim which Virginia had set up to an extensive and fertile country; the one would be, they said, directly injurious to Maryland, while the other would be inconsistent with the letter and spirit of the proposed Confederation. They supposed, on the one hand, that a sale by Virginia of only a small proportion of these lands would draw into her treasury vast sums of money, enabling her to lessen her taxes, and thereby to drain the less wealthy neighboring state of its most useful inhabitants, which would cause it to sink, in wealth and consequence, in the scale of the confederated states. On the other hand, they suggested that Virginia might, and probably would, be obliged to divide its territory, and to erect a new state, under the auspices and direction of the elder, from whom it would receive its form of government, to whom it would be bound by some alliance, and by whose counsel it would be influenced. They declared that, if this were to take place, it would be inconsistent with the letter and spirit of the confederation already proposed; that, if it were to result in the establishment of a sub-confederacy, an *imperium in imperio*, the state possessed of this extensive dominion must then

either submit to all the inconveniences of an overgrown and unwieldy government, or suffer the authority of Congress to interpose at a future time, and lop off a part of its territory to be erected into a new and free state, and admitted into a confederation on such conditions as should be settled by nine states. If, they asked, it should be necessary, for the happiness and tranquillity of a state thus overgrown, that Congress should, at some future time, interfere and divide its territory, why should the claim to that territory be now made and insisted upon? Policy and justice, they urged, alike required that a country—unsettled at the commencement of the war, claimed by the British crown and ceded to it by the Treaty of Paris—if wrested from the common enemy by the blood and treasure of the thirteen states, should be considered as a common property, subject to be parcelled out by Congress into free, convenient, and independent governments, in such manner and at such times as their wisdom might thereafter direct. Coolly and dispassionately considering the subject, weighing probable inconveniences and hardships against the sacrifice of just and essential rights, they then instructed their delegates to withhold the assent of Maryland to the Confederation until an article or articles could be obtained in conformity with these views.<sup>1</sup>

Against this proposition the state of Virginia, which had already ratified the Articles of Confederation, so remonstrated that there appeared to be no prospect of reconciling the difficulty. At this juncture the state of New York came forward, and by an act of its legislature, passed on the 19th of February, 1780, authorized its delegates in Congress to limit the western boundaries of the state, and ceded a portion of its public lands for the use and benefit of such of the United States as should become members of the federal alliance. The motives upon which this concession was expressly made had reference to the formation of the Union by removing, as far as depended upon the state of New York, the impediment which had so long prevented it.<sup>2</sup>

After they had received official notice of this act, by a report made on the 6th of September, 1780, Congress pressed upon the other states, similarly situated, the policy of a liberal surrender of

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<sup>1</sup> Secret Journals, I. 433.

<sup>2</sup> Ibid., 440.

a portion of their territorial claims, as they could not be preserved entire without endangering the stability of the general confederacy; reminding them how indispensably necessary it was to establish the Federal Union on a fixed and permanent basis, and on principles acceptable to all its respective members; how essential it was to public credit and confidence, to the support of the army, to the vigor of the national councils, to tranquillity at home, to reputation abroad, and to the very existence of the people of America as a free, sovereign, and independent people. At the same time they earnestly requested the legislature of the state of Maryland to accede to the Confederation.<sup>1</sup>

That state was not without examples of patriotic confidence among her smaller sister states. As early as the 20th of November, 1778, New Jersey had led the way to a generous trust on the part of the states which still remained out of the Union. She declared that the Articles of Confederation were in divers respects unequal and disadvantageous to her, and that her objections were of essential moment to the welfare and happiness of her people; yet, convinced of the present necessity of acceding to the confederacy proposed, feeling that every separate and detached interest ought to be postponed to the general good of the Union, and firmly believing that the candor and justice of the several states would, in due time, remove the inequality of which she complained, she authorized her delegates to accede to the Confederation.<sup>2</sup>

Delaware followed with not unequal steps. On the 1st of February, 1779, she declared that, although she was justly entitled to a right, in common with the other members of the Union, to that extensive tract of country lying to the westward of the frontiers of the United States, gained by the blood and treasure of all, and therefore proper to become a common estate, to be granted out on terms beneficial to all; yet, for the same reasons, and from the same motives with those announced by New Jersey, and with a like faith in the sense of justice of her great confederates, she ratified the Articles of Confederation.<sup>3</sup>

These examples were not without influence upon the councils of patriotic Maryland. On the 30th of January, 1781, her legislature passed an act, the preamble of which commences with these

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<sup>1</sup> Secret Journals, I. 442.

<sup>2</sup> Ibid., 421.

<sup>3</sup> Ibid., 424.

memorable words: "Whereas it hath been said that the common enemy is encouraged, by this state not acceding to the Confederation, to hope that the union of the sister states may be dissolved; and they therefore prosecute the war in expectation of an event so disgraceful to America; and our friends and illustrious ally are impressed with an idea that the common cause would be promoted by our formally acceding to the Confederation: This General Assembly, conscious that this state hath, from the commencement of the war, strenuously exerted herself in the common cause, and fully satisfied that, if no formal confederation were to take place, it is the fixed determination of this state to continue her exertions to the utmost, agreeable to the faith pledged in the Union;—from an earnest desire to conciliate the affection of the sister states, to convince all the world of our unalterable resolution to support the independence of the United States, and the alliance with his most Christian majesty, and to destroy forever any apprehension of our friends, or hope in our enemies, of this state being again united to Great Britain;—Be it enacted," etc. The act then proceeded to adopt and ratify the Articles of Confederation, relying on the justice of the other states to secure the interests of the whole in the unoccupied western territory.<sup>1</sup>

As soon as this act of Maryland was laid before Congress, the joyful news was announced to the country that the union of the states was consummated under the written instrument which had been so long projected. The same month which saw the completion of this union witnessed a cession by Virginia to the United States of all her claims to lands northwest of the river Ohio; but the cession was not finally completed and accepted until the month of March, 1784. This vast territory, now the seat of prosperous and powerful states, came into the possession of the United States, under a provision made by Congress, that such lands should be disposed of for the common benefit of the United States, and should be settled and formed into distinct republican states, to become members of the Federal Union, with the same rights of sovereignty, freedom, and independence as the other states.

The historian who may, in any generation, record these noble acts of patriotism and concession, should pause and contemplate

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<sup>1</sup> Secret Journals, I. 445.

the magnitude of the event with which they were connected. He should pause to render honor to the illustrious deeds of that great community which first generously withdrew the impediment of its territorial claims, and to the no less gallant confidence of those smaller states which trusted to the future for the final and complete removal of the inequality of which they complained. He should render honor to the state of New York for the surrender of a territory to which she believed her legal title to be complete; a title which nothing but the paramount equity of the claims of the whole Confederacy ought to have overcome. That equity she acknowledged. She threw aside her charters and her title-deeds; she ceased to use the language of royal grants, and discarded the principle of succession. She came forth from among her parchments into the forum of conscience, in presence of the whole American people; and—recognizing the justice of their claim to territories gained by their common efforts—to secure the inestimable blessings of union, for their good and for her own, she submitted to the national will the determination of her western boundaries, and devoted to the national benefit her vast claims to unoccupied territories.

Equal honor should be rendered to New Jersey, to Delaware, and to Maryland. The two former, without waiting for the action of a single state within whose reputed limits these public domains were situate, trusted wholly to a future sense of justice, and ratified the union in the confidence that justice would be done. The latter waited; but only until she saw that the common enemy was encouraged, and that friends were disheartened, by her reserve. Seeing this, she hesitated no longer, but completed the union of the states before Virginia had made the cession which afterwards so nobly justified the confidence that had been placed in her.<sup>1</sup>

The student of American constitutional history, therefore, cannot fail to see that the adoption of the first written constitution was accomplished through great and magnanimous sacrifices. The very foundations of the structure of government since raised

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<sup>1</sup> After the Confederation had thus been formed, by subsequent cessions of their claims by the other states, to use the language of Mr. Justice Story, "this great source of national dissension was at last dried up."

rest upon splendid concessions for the common weal, made, it is true, under the stern pressure of war, but made from the noblest motives of patriotism. These concessions evince the progress which the people of the United States were then making towards both a national character and a national feeling. They show that, while there were causes which tended to keep the states apart—the formation of state constitutions, the conflicting interests growing out of the inequalities of these different communities, and the previous want of a national legislative power—there were still other causes at work which tended to draw together the apparently discordant elements, and to create a union in which should be bound together, as one nation, the populations which had hitherto known only institutions of a local character. The time was indeed not come when these latter tendencies could entirely overcome the former. It was not until the trials of peace had tested the strength and efficiency of a system formed under the trials of war—when another and a severer conflict between national and local interests was to shake the republic to its centre—that a national government could be formed, adequate to all the exigencies of both. Still, the year 1781 saw the establishment of the Confederation, caused by the necessities of military defence against an invading enemy. But it was accomplished only through the sacrifice of great claims; and the fact that it was accomplished, and that it led the way to our present Constitution, proves at once the wisdom and the patriotism of those who labored for it.

The great office of the Confederation, in our political history, will be a proper topic for consideration after the analysis of its provisions. But we should not omit to observe here, that, when the union of the states was thus secured, the motives on which it was formed, and the concessions by which it was accompanied and followed, created a vast obstacle to any future dissolution. The immediate object of each state was to obtain its own independence of the crown of Great Britain, through the united, and therefore more powerful, action of all the states. But, in order to effect such a union, that immense territory over which, in the language of Maryland, “free, convenient, and independent governments” were afterwards to be formed, was to be ceded in advance, or to be impliedly promised to be ceded, to the use and

benefit of the whole Confederacy. A confederacy of states which had become possessed of such a common property was thus bound together by an interest, the magnitude and force of which cannot now be easily estimated. The Union might incur fresh dangers of dissolution after the war had ceased; its frame of government and its legislative power might prove wholly inadequate to the national wants in time of peace; the public faith might be prostrated and the national arm enfeebled; still, while the Confederacy stood as the great trustee of property large enough for the accommodation of an empire, a security existed against its total destruction. No state could withdraw from the Confederation without forfeiting its interest in this grand public domain; and no human wisdom could devise a satisfactory distribution of property ceded as a common fund for the common benefit of sovereign states without any fixed ratio of interest in the respective beneficiaries, and without any clear power in the government of the Confederation to deal with the trust itself.<sup>1</sup>

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<sup>1</sup> One of the great inducements to the adoption of the Constitution of the United States was to give the general government adequate constitutional power to dispose of the western territory and to form new states out of it. Congress, under the Confederation, had no express authority to do this, although they proceeded both to dispose of the lands and to erect new states, by the Ordinance of 1787. See *The Federalist*, No. 38, 42, 43. *Story's Commentaries on the Constitution*, III. 184-190, 1st edition. Appendix to the present volume, Note on the Ordinance of 1787.



## CHAPTER VI.

### NATURE AND POWERS OF THE CONFEDERATION.

THE nature of the government established by the Articles of Confederation can be understood only by an analysis of their provisions. For this purpose the instrument must here be examined with reference to three principal topics: first, the union which it established between the different members of the Confederacy; second, the form of the government which it created; and third, the powers which it conferred, or omitted to confer, upon that government.

I. The parties to this instrument were free, sovereign, and independent political communities—each possessing within itself all the powers of legislation and government, over its own citizens, which any political society can possess. But, by this instrument, these several states became united together for certain purposes. The instrument was styled “Articles of Confederation and Perpetual Union between the States,” and the political body thus formed was entitled “The United States of America.” The articles declared—as would, indeed, be implied, in such circumstances, without any express declaration—that each state retained its sovereignty, freedom, and independence, and every power, jurisdiction, and right not expressly delegated by the instrument itself to the United States in Congress assembled. The nature and objects of this union were described as a firm league of friendship between the states, for their common defence, the security of their liberties, and their mutual and general welfare; and the parties bound themselves to assist each other against all force offered to or attacks made upon them, or any of them, on account of religion, sovereignty, trade, or under any pretence whatever.

It was also provided that the free inhabitants of each state should be entitled to all the privileges of free citizens in the sev-

eral states;<sup>1</sup> that there should be an open intercourse and commerce between the different states; that fugitives from justice from one state to another should be delivered up; and that full faith and credit should be given in each state to the records, acts, and judicial proceedings of every other state.\*

II. The government established by the Articles of Confederation consisted of a single representative body, called a General Congress. In this body were vested all the powers, executive, legislative, and judicial, granted to the United States. The members of it were to be chosen by the states, in such manner as the legislature of each state might determine; no state to be represented by more than seven delegates, or by less than two. No delegate was eligible for more than three years in a period of six; and no delegate could hold any office of emolument under the United States. Each state was to maintain its own delegates, and in the determination of questions the voting was to be by states, each state having one vote.

III. It should be remembered that the objects and purposes of the Confederation related chiefly to the defence of the states against external attacks; and it was, therefore, as it purported to be, a league for mutual defence and protection, through the combined powers of the whole, operating in certain forms and under certain restrictions. For the manner in which this new authority was to be exercised, we are to look at the powers conferred upon "the United States in Congress assembled." These powers related to external and to internal affairs.

With regard to the external relations of the country, Congress was invested with the sole and exclusive right of determining on peace and war, unless in case of an invasion of a state by enemies, or an imminent danger of invasion by Indians; of sending and

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<sup>1</sup> That is to say, that a citizen of any state might go and reside in any other state, and be there entitled to all the privileges of a citizen of that state.

\* The meaning of this is, that, on the production in any state of a law passed or of a judgment rendered in any other state, properly authenticated, it should be admitted that such a law had been passed or such a judgment rendered in the state whose act it purported to be, and that all the legal consequences should follow.

receiving ambassadors; of entering into treaties and alliances, under the limitation that no treaty of commerce could be made which would have the effect to restrain the legislature of any state from imposing such imposts and duties on foreigners as their own people were subjected to, or which would operate to prohibit the exportation or importation of any commodity whatever. Congress was also invested with power to deal with all captures and prizes made by the land or naval forces of the United States; to grant letters of marque and reprisal in times of peace; and to establish courts for the trial of piracies and felonies committed on the high seas, and for determining appeals in cases of capture.

With regard to internal affairs, Congress was invested with power to decide, in the last resort, on appeal, all disputes between two or more states concerning boundary, jurisdiction, or any other cause; and also all controversies concerning land-titles, where the parties claimed under different grants of two or more states before the settlement of their jurisdiction; but no state was to be deprived of territory for the benefit of the United States. Congress was also invested with the sole and exclusive right and power of regulating the alloy and value of coin struck by their authority, or by that of any of the United States; of fixing the standard of weights and measures throughout the United States; of regulating the trade and managing all affairs with the Indians who were not members of any state, provided that the legislative authority of any state, within its own limits, should not be infringed or violated; of establishing and regulating post-offices from one state to another, and exacting postage to defray the expenses; of appointing all officers of the land forces in the service of the United States, and of making rules for the government and regulation of the land and naval forces, and directing their operations.

Congress was also invested with power to appoint a "committee of the States," to sit in the recess of Congress, to consist of one delegate from each state, and other committees and civil officers, to manage the general affairs under their direction; to appoint one of their number to preside, but authorizing no person to serve in the office of president more than one year in a term of three years; to ascertain and appropriate the necessary sums for the public service; to borrow money and emit bills on the credit

of the United States; to build and equip a navy; and to agree upon the number of land forces, and make requisitions upon each state for its quota, in proportion to the numbers of white inhabitants in such state. The legislature of each state was to appoint the regimental officers, enlist the men, and clothe, arm, and equip them at the expense of the United States.

Such were the powers conferred upon Congress by the Articles of Confederation. But the restrictions imposed, in the same instrument, greatly qualified and weakened, and in fact almost rendered nugatory, the greater part of them. It was expressly provided that Congress should never engage in a war; nor grant letters of marque or reprisal in time of peace; nor enter into any treaties or alliances; nor coin money or regulate its value; nor ascertain the sums of money necessary for the public purposes; nor emit bills; nor borrow money on the credit of the United States; nor appropriate money; nor agree upon the number of vessels for the navy, or the number of land or sea forces to be raised; nor appoint a commander-in-chief of the army or navy—unless nine states should assent to the same. The committee of the states authorized to sit during the recess of Congress could not do any of these things, for the assent of nine states could not be delegated.

The revenues of the country were left by the Articles of Confederation wholly in the control of the separate states. It was provided that all charges of war, and all other expenses for the common defence or general welfare, should be defrayed out of a common treasury; but this treasury was to be supplied, not by taxes, duties, or imposts levied by or under the authority of Congress, but by taxes to be laid and levied by the legislatures of the several states, within such time as might be fixed by Congress. The amount to be furnished by each state was in proportion to the value of the land within its limits granted or surveyed, and the buildings and improvements thereon, to be estimated according to the mode prescribed by Congress. The sole means, therefore, which the Confederation gave to Congress of supplying the treasury of the United States, was to vote what sum was wanted, and to call upon the legislature of each state to pay in its proportion within a given time. The commerce of the country was left entirely within the control of the state legislatures; render-

ing it the commerce of thirteen different states, each of which could levy what duties it saw fit upon all exports and imports, provided they did not interfere with any treaties then proposed, or touch the property of the United States or that of any other state. The United States had no power of taxation, direct or indirect.

The Articles of Confederation were also entirely without any provision for enforcing the measures which they authorized Congress to adopt for the general welfare of the Union. It was declared in the instrument that every state should abide by the determinations of Congress on all the questions over which the instrument gave that body control; that the articles should be inviolably observed by every state; that the union should be perpetual; and that no alterations should be made in any of the articles unless agreed to by Congress, and confirmed by the legislature of every state. But these declarations, however strong and emphatic in their terms, only made the Confederation in fact, as in name, a league or compact between sovereign states; for it gave the government of the union no power to enforce its own measures or laws by process upon the persons of individuals, and consequently any party to the instrument could infringe any or all of its provisions, without any other consequence than a resort to arms by the general Confederacy, which would have been civil war.

These, with some restrictions upon the power of the states in regard to the making of treaties, engaging in war, sending ambassadors, and some other topics, were the main provisions of the Articles of Confederation; and under the government thus constituted, the United States, on the second day of March, 1781, entered upon a new era of civil polity, and commenced a new existence, under somewhat happier auspices than they had known before.

It will be seen, in the further development of the period which followed the establishment of this confederation, down to the calling of the convention which framed the Constitution, that what I have called the great office of the Confederation in our political system was indeed a function of vast importance to the happiness of the American people, but, at the same time, was one that was necessarily soon fulfilled, to be followed by a more perfect organization for the accomplishment of the objects and the satisfaction of the wants which it brought in its train. This office of the Confederation was, to demonstrate to the people of the

American States the practicability and necessity of a more perfect union. The Confederation showed to the people of these separate communities that there were certain great purposes of civil government which they could not discharge by their separate means; that independence of the crown of Great Britain could not be achieved by any one of them, unassisted by all the rest; that no one of them, however respectable in population or resources, could be received and dealt with, by the governments of the world, as a nation among nations; but that, by union among themselves, by some political tie which should combine all their resources in the hands of one directing power, and make them, in some practical sense, one people, it was possible for them to achieve their independence and take a place among the nations. The Confederation made it manifest that these consequences could be secured. It did not, indeed, answer all the purposes, or accomplish all the objects, which had been designed or hoped from it: it was defective as a means; but it taught the existence of an end, and demonstrated the possibility of reaching that end, by showing that in some form, and for some purposes, a union of the states was both possible and necessary. It thus made the permanent idea of union familiar to the people of the different states. It did more than this. It created a larger field for statesmanship by creating larger interests, to be managed by that higher order of men who could rise above local concerns and sectional objects and embrace within the scope of their vision the happiness and welfare of a continent. It introduced to men's minds the great ideas of national power and national sovereignty, as the agencies that were to work out the difficult results which no local power could accomplish; and, although these ideas were at first vague and indefinite, and made but a slow and difficult progress against influences and prejudices of a narrower kind, they were planted in the thoughts of men, to ripen into maturity and strength in the progress of future years.<sup>1</sup>

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<sup>1</sup> The armorial bearings of the United States were adopted on the 20th of June, 1782. Journals, VII. 395. The origin of the American flag has been written by Commodore George H. Preble, Albany, S. Munsell, 1872.

## CHAPTER VII.

1781-1783.

REQUISITIONS.—CLAIMS OF THE ARMY.—NEWBURGH ADDRESSES.—  
PEACE PROCLAIMED.—THE ARMY DISBANDED.

THE interval of time which extends from the adoption of the Articles of Confederation to the initiatory steps for the formation of the Constitution must be divided into two periods: that which preceded and that which followed the peace of 1783; in both of which the defects of the Confederation were rapidly developed, and in both of which efforts were made to supply those defects by an enlargement of the powers of Congress. The reader's attention, however, will now be confined to the first of these periods.

Congress assembled, under the Confederation, on the 2d of March, 1781, and the Treaty of Peace, which put an end to the war and admitted the independence of the United States, was definitively signed on the 3d of September, 1783, and was ratified and proclaimed by Congress on the 14th of January, 1784.

Notwithstanding the solemn engagements into which the states had entered with each other, under the Articles of Confederation, the prospect of bringing the war to a close, through a compliance with those obligations, was exceedingly faint at the commencement of the campaign of 1782. The United States had made a treaty of alliance with the King of France in 1778;<sup>1</sup> and in pursuance of that treaty, six thousand French troops arrived at Newport in July, 1780, and in the spring of 1781 joined the American army near New York. The presence in the country of a foreign force, sent hither by the ancient rival of England, to

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<sup>1</sup> The treaty was concluded at Paris, February 6, 1778, and was ratified by Congress on the 5th of May. Journals, IV. 256, 257.

assist the people of the United States in their contest for independence, encouraged an undue reliance upon external aid. Many of the States became culpably remiss in complying with the requisitions of Congress; and, although they had so recently authorized Congress to make requisitions, both for men and money, and had provided the form in which they were to be made, the adoption of the Articles of Confederation had very little tendency to render the states prompt to discharge the obligations which they imposed. In October and November, 1781, Congress called upon the states to raise their several quotas of eight millions of dollars, for the use of the United States, and recommended to them to lay taxes for raising these quotas separate from those laid for their own particular use, and to pass acts directing the collectors of the taxes intended for the use of the United States to pay the same directly into the treasury of the Union.<sup>1</sup> In December of the same year, Congress also called upon the states, with great urgency, to complete their quotas of troops for the next campaign.<sup>2</sup>

The aid of Washington was invoked to influence the action of the states upon these requisitions. On the 22d of January, 1782, he addressed a circular letter to the governors of the states, to be laid before their respective legislatures, on the subject of finance; reminding them how the whole army had been thrown into a ferment twelve months before for the want of pay and a regular supply of clothing and provisions; warning them that the recent successes in Virginia, by the capture of Lord Cornwallis's army, might have a fatal tendency to cool the ardor of the country in the prosecution of the war; assuring them that a vigorous prosecution of that war could alone secure the independence of the United States; and urging them to adopt such measures as would insure the prompt payment of the sums which Congress had called for.<sup>3</sup> A few days afterwards he addressed a similar letter to the states, on the subject of completing their quotas of troops, in which he told them that the continuance or termination of the war now rested on their vigor and decision;

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<sup>1</sup> Resolves of October 30 and November 2, 1781. Journals, VII. 167, 169.

<sup>2</sup> Resolves of December 10, 1781. Journals, VII. 190.

<sup>3</sup> Writings, VIII. 226.



and that, even if the enemy were, in consequence of their late reverses, disposed to treat, nothing but a decidedly superior force could enable us boldly to claim our rights and dictate the terms of pacification. "And soon," he said, "might that day arrive, and we might hope to enjoy all the blessings of peace, if we could see again the same animation in the cause of our country inspiring every breast, the same passion for freedom and military glory impelling our youths to the field, and the same disinterested patriotism pervading every rank of men, that was conspicuous at the commencement of this glorious revolution; and I am persuaded that only some great occasion was wanting, such as the present moment exhibits, to rekindle the latent sparks of that patriotic fire into a generous flame, to rouse again the unconquerable spirit of liberty, which has sometimes seemed to slumber for a while, into the full vigor of action."<sup>1</sup>

Notwithstanding these urgent appeals, the spring of 1782 arrived, and the summer passed away, without any substantial compliance by the states with the requisitions of Congress for either men or money. When Washington arrived in camp, in May, to commence the campaign that was to extort from the British government—now in the hands of a new ministry, supposed to be more favorable to peace—the terms which he hoped might be procured, there were less than ten thousand men in the Northern army; and their numbers were not much increased during the summer.<sup>2</sup> Great and dangerous discontents now existed in the army, both among officers and soldiers, concerning the arrearages of pay; for, as the prospects of peace became brighter, it seemed to become more and more probable that the army would ultimately be disbanded without adequate provision for its claims, and that officers and men would be thrown penniless upon the world, unpaid by the country whose independence they had achieved.

At this period there occurred the famous proceedings of the officers, called the Newburgh Addresses, on the subject of half-pay; and since the claims of the officers and soldiers, as public creditors of the United States, are intimately connected with the

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<sup>1</sup> Writings, VIII. 232, 235.

<sup>2</sup> Sparks's Life of Washington, p. 380.

constitutional history of the country, it is needful to give here a brief account of them.

The pay of the officers in the Revolutionary army was originally established upon so low a scale that men with families dependent upon them could feel little inducement to remain long in a service the close of which was to be rewarded only with a patent for a few hundred acres of land in some part of the western wilderness. In the year 1778 it had become apparent to Washington that something must be done to avert the consequences of the mistaken policy on which Congress had acted with reference to the army; and while at Valley Forge—that scene of dreadful suffering by the army—he wrote on this subject to the President of Congress the first of a series of most able and instructive letters, which extend through the five following years.<sup>1</sup>

On the 17th of April, after this first letter had been laid before Congress, a resolution was moved that an establishment of half-pay be made for officers who should serve during the war, to begin after its conclusion.<sup>2</sup> Four days afterwards the sense of the house was taken on the question whether there should be any provision made for the officers after the conclusion of the war, and the affirmative was carried by the votes of eight states against four.<sup>3</sup> On the 26th of April a proposition that half-pay be granted for life, to commence at the close of the war, passed by a majority of one state; six states voting in the affirmative, five in the negative, and one being divided.<sup>4</sup> The next day the value of this vote was destroyed by a resolution which provided that the United States should have the right to redeem the half-pay for life by giving to the officer entitled six years' half-pay;<sup>5</sup> and on the 15th of May Congress substituted for the whole scheme a pro-

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<sup>1</sup> Letter of April 10, 1778. Writings of Washington, V. 312.

<sup>2</sup> Journals, IV. 221.

<sup>3</sup> Ibid. 228, 229. The states which voted in the negative were Rhode Island, Connecticut, New Jersey, and South Carolina.

<sup>4</sup> Ibid. 243. The states voting in the negative were Massachusetts, Rhode Island, Connecticut, New Jersey, and South Carolina. The state whose vote was divided was Pennsylvania.

<sup>5</sup> Ibid. 244. Under this resolve, each officer was entitled to receive half-pay annually, for the term of seven years after the conclusion of war, if living.

vision of half-pay for seven years, taking away the option of half-pay for life.<sup>1</sup>

This miserable and vacillating legislation shows the unpopularity of the scheme of such an establishment, although demanded alike by considerations of justice and policy.<sup>2</sup> The spirit which, for a time, actuated a part of the people of this country towards the men who were suffering so much in the cause of national independence evinces an extreme jealousy for the abstract principles of civil liberty, unmitigated by the generous virtues of justice and gratitude. This spirit was duly represented in Congress. The main arguments employed out of doors were, that pensions were contrary to the maxims and spirit of our institutions; that to grant half-pay for life to the officers was establishing a privileged class of men who were to live upon the public for the rest of their days; and that the officers entered the service on the pay and inducements originally offered, without any promise or prospect of such a reward. This kind of impracticable adherence to a principle, working in this instance the greatest injustice and leading ultimately to a breach of public faith, was the principal cause that prolonged the war, and made it cost so much suffering, so much blood, and so much treasure. The people of the United States adhered so tenaciously to the principles and axioms of freedom, that, even when they had undertaken a war for their own security and independence against a foreign foe, they would not establish a government with the power of direct taxation, or organize an army with suitable rewards for service. The want of such a power in their government led to the enormous emissions of paper money, which brought with them a long train of sufferings and disasters, ending at last in national bankruptcy. The want of justice to the army placed the civil liberty of the country in imminent danger, and finally led to the oppression of men whose valor had first won, and whose patriotism then saved it from destruction.

In the six months which followed the vote of the 15th of May,

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<sup>1</sup> Journals, IV. 288.

<sup>2</sup> On the 21st of April, in the resolution reported by a committee, the words "an establishment of half-pay for life" were, on motion, changed to "a provision of half-pay;" an amendment which reveals very plainly the character of the popular objections. Journals, IV. 228.

1778, the provision which it had made was found to be wholly inadequate, and Washington, then at Philadelphia, again earnestly pressed the subject upon the attention of Congress. On the 11th of August, 1779, a report from a committee on this subject being under consideration, a motion was made to amend it, by inserting a provision that the half-pay granted by the resolve of the 15th of May, 1778, be extended so as to continue for life; and this motion was carried by a vote of eight states against four.<sup>1</sup> On the 17th Congress resolved that the consideration of that part of the report for extending the half-pay be postponed, and that it be recommended to the several states that had not already adopted measures for that purpose to make such further provision for the officers and soldiers enlisted for the war, who should continue in service till the establishment of peace, as would be an adequate compensation for their dangers, losses, and hardships, either by granting to the officers half-pay for life and proper rewards to the soldiers, or in such other manner as might appear most expedient to the legislatures of the several states.<sup>2</sup>

Before the passage of this resolve the state of Pennsylvania had placed her officers upon an establishment of half-pay for life, and with the happiest consequences. But no other state followed her example; and in the autumn of 1780 it became necessary for Washington to apply to Congress again.<sup>3</sup> At length, in consequence of his earnest and repeated appeals, a resolve was passed, on the 21st of October, that the officers who should continue in service to the end of the war should be entitled to half-pay during life, to commence from the time of their reduction.<sup>4</sup>

From this time, therefore, the officers of the army continued in the service, relying upon the faith of the country, as expressed in the vote of the 21st of October, 1780, and believing, until they saw proof to the contrary, that the public faith thus pledged to them would be observed.<sup>5</sup> But they were destined to a severe disappointment; and one of the causes of that disappointment was the adoption of the Articles of Confederation. The very

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<sup>1</sup> Journals, V. 312.

<sup>2</sup> Ibid. 316, 317.

<sup>3</sup> Writings of Washington, VII. 165, 246.

<sup>4</sup> Journals, VI. 336.

<sup>5</sup> See General Washington's letter to General Sullivan (in Congress), November 20, 1780. Writings, VII. 297.

change in the constitutional position of the country, from which the most happy results were anticipated, and which undoubtedly cemented the Union, became the means by which they were cheated of their hopes. The Congress of 1780, which had pledged to them a half-pay for life, was the Revolutionary Congress; but the Congress which was to redeem this pledge was the Congress of the Confederation, which required a vote of nine states for an appropriation of money, or a call upon the states for their proportions. When the vote granting the half-pay for life was passed there were less than nine states in favor of the measure; and after the Confederation was established the delegates of the states which originally opposed the provision could not be brought to consider it in its true light—that of a compact with the officers. It was even contended that the vote, having passed before the Confederation was signed and acted upon, was not obligatory upon the Congress under the Confederation, as that instrument required the votes of nine states for an appropriation of money. In this manner men deluded themselves with the notion that a change in the form of a government, or in the constitutional method of raising money to discharge the obligations of a contract, can dissolve those obligations, or alter the principles of justice on which they depend. The states in the opposition to the measure refused to be coerced, as they were pleased to consider it, and in the autumn of 1782 the officers became convinced that they had nothing to hope for from Congress but a reference of their claims to their several states.<sup>1</sup>

In November, 1782, preliminary and eventual articles of peace were agreed upon between the United States and Great Britain, by their plenipotentiaries. Nothing had been done by Congress for the claims of the army, and it seemed highly probable that it would be disbanded without even a settlement of the accounts of the officers, and, if so, that they would never receive their dues. Alarmed and irritated by the neglect of Congress; destitute of money and credit and of the means of living from day to day; oppressed with debts; saddened by the distresses of their families at home and by the prospect of misery before them—they pre-

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<sup>1</sup> See the letter of General Lincoln, Secretary at War, to Washington, cited by Mr. Sparks, VIII. 356.

sented a memorial to Congress in December, in which they urged the immediate adjustment of their dues, and offered to commute the half-pay for life, granted by the resolve of October, 1780, for full pay for a certain number of years, or for such a sum in gross as should be agreed on by their committee sent to Philadelphia to attend the progress of the memorial through the house. It is manifest from statements in this document, as well as from other evidence, that the officers were nearly driven to desperation, and that their offer of commutation was wrung from them by a state of public opinion little creditable to the country. They recited their hardships, their poverty, and their exertions in the cause; and all that they said was fully borne out by their great commander, in his personal remonstrances with many of the members of Congress. The officers asserted that many of their brethren who had retired on the half-pay promised by the resolve of 1780 were not only destitute of any effectual provision, but had become objects of obloquy; and they referred with chagrin to the odious view in which the citizens of too many of the states endeavored to place those who were entitled to that provision.

But, from the prevailing feeling in Congress and in the country, nothing better was to be expected than a compromise in place of the discharge of a solemn obligation; and this feeling no American historian should fail to record and to condemn. If these men had borne only the character of public creditors, a state of public feeling which drove them into a compromise of their claims ought always to be severely reprehended. But, beyond the capacity of public creditors, they were the men who had fought the battles which liberated the country from a foreign yoke; who had endured every extremity of hardship, every form of suffering, which the life of a soldier knows; who had stood between the common soldiery and the civil power; and often, at the hazard of their lives, preserved that discipline and subordination which the civil power had done too much to hazard. They were, in a word, the men of whom their commander said that they had exhibited more virtue, fortitude, self-denial, and perseverance than had perhaps been then paralleled in the history of human enthusiasm.

Painful, therefore, as it is, this lesson, of the wrong that may be done by a breach of public faith, must be read. It lies open on the page of history, and is the case of those to whose right

arms the people of this country owe the splendid inheritance of liberty. All real palliations should be sought for and admitted. The country was poor: no proper system of finance had been, or could be, developed by a government which had no power of taxation; and the ideas and feelings of the people of many of the states were provincial, and without the liberality and enlargement of thought which comes of intercourse with the world. But, after every apology has exhausted its force, the conscientious student of history must mark the dereliction from public duty; must admit what the public faith required; and must observe the dangerous consequences which attend, and must ever attend, the breach of a public obligation.

The immediate consequences which followed, in this instance, were predicted by Washington, who gave the clearest warning, in advance of the officers' memorial, of the hazards that would attend the further neglect of their claims. But his warning seems to have been unheeded, or to have made but little impression against the prevailing aversion to touch the unpopular subject of half-pay. The committee of the officers were in attendance upon Congress during the whole winter, and early in March, 1783, they wrote to their constituents that nothing had been done.

At this moment the predicament in which Washington stood, in the double relation of citizen and soldier, was critical and delicate in the extreme. In the course of a few days all his firmness and patriotism, all his sympathies as an officer, on the one side, and his fidelity to the government on the other, were severely tried. On the 10th of March an anonymous address was circulated among the officers at Newburgh, calling a meeting of the general and field officers, and of one officer from each company, and one from the medical staff, to consider the late letter from their representatives at Philadelphia, and to determine what measures should be adopted to obtain that redress of grievances which they seemed to have solicited in vain. It was written with great ability and skill.<sup>1</sup> It spoke the language of injured feeling; it

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pointed directly to the sword as the remedy for injustice ; and it spoke to men who were suffering keenly under public ingratitude and neglect. Its eloquence and its passion fell, therefore, upon hearts not insensible, and a dangerous explosion seemed to be at hand. Washington met the crisis with firmness, but also with conciliation. He issued orders forbidding an assemblage at the call of an anonymous paper, and directing the officers to assemble on Saturday, the 15th, to hear the report of their committee, and to deliberate what further measures ought to be adopted as most rational and best calculated to obtain the just and important object in view. The senior officer in rank present was directed to preside, and to report the result to the commander-in-chief.

On the next day after these orders were issued, a second anonymous address appeared from the same writer. In this paper he affected to consider the orders of Washington, assuming the direction of the meeting, as a sanction of the whole proceeding which he had proposed. Washington saw at once that he must be present at the meeting himself, or that his name would be used to justify measures which he intended to discountenance and prevent. He therefore attended the meeting, and under his influence, seconded by that of Putnam, Knox, Brooks, and Howard, the result was the adoption of certain resolutions, in which the officers, after reasserting their grievances, and rebuking all attempts to seduce them from their civil allegiance, referred the whole subject of their claims again to the consideration of Congress.

Even at this distant day the peril of that crisis can scarcely be contemplated without a shudder. Had the commander-in-chief been other than Washington, had the leading officers by whom he was surrounded been less than the noblest of patriots, the land would have been deluged with the blood of a civil war. But men who had suffered what the great officers of the Revolution had suffered, had learned the lessons of self-control which suffering teaches. The hard school of adversity in which they had passed

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ing the period when they appeared, is remarkably good. They are written with great point and vigor of expression and great purity of English. For the purpose for which they were designed—a direct appeal to feeling—they show the hand of a master.



so many years made them sensible to an appeal which only such a chief as Washington could make; and, when he transmitted their resolves to Congress, he truly described them as "the last glorious proof of patriotism which could have been given by men who aspired to the distinction of a patriot army; not only confirming their claim to the justice, but increasing their title to the gratitude, of their country."<sup>1</sup>

The effect of these proceedings was the passage by Congress of certain resolves, on the 22d of March, 1783, commuting the half-pay for life to five years' full pay after the close of the war, to be received, at the option of Congress, in money, or in such securities as were given to other creditors of the United States.\* On the 4th of July the accounts of the army were ordered to be made up and adjusted, and certificates of the sums due were required to be given in the form directed by the Superintendent of Finances. On the 18th of October a proclamation was issued disbanding the army.

From this time the officers passed into the whole mass of the creditors of the United States; and although they continued to constitute a distinct class among those creditors, the history of their claims is to be pursued in connection with that of the other public debts of the country. The value of the votes which fixed their compensation, and paid them in public securities, depended, of course, upon the ability of the government to redeem the obligations which it issued. The general financial powers of the Union, therefore, under the Confederation, must hereafter be considered.

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<sup>1</sup> March 18, 1783. Writings, VIII. 396.

\* The resolves gave the option to lines of the respective states, and not to the officers individually in those lines, to accept or refuse the commutation. Journals, VIII. 162.

## CHAPTER VIII.

1781-1783.

### FINANCIAL DIFFICULTIES OF THE CONFEDERATION.—REVOLUTIONARY DEBT.—REVENUE SYSTEM OF 1783.

It is not easy to ascertain the amount of the public debt of the United States at the time when the Confederation went into operation. But on the 1st of January, 1783, it amounted to about forty-two millions of dollars. About eight millions were due on loans obtained in France and Holland, and the residue was due to citizens of the United States. The annual interest of the debt was a little more than two million four hundred thousand dollars.<sup>1</sup>

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<sup>1</sup> The debt due to the crown of France was ascertained in 1782 to be eighteen millions of livres; and by the contract entered into by the United States with the King of France, on the 16th of July, 1782, the principal of this debt was to be paid in twelve annual instalments of one million five hundred thousand livres each, in twelve years, to commence from the third year after a peace, at the royal treasury in Paris. The interest was payable annually, at the time and place stipulated for the payment of the instalments of the principal, at five per cent. The king generously remitted the arrears of interest due at the date of the contract. There was also due to the King of France ten millions of livres, borrowed by him of the States-General of the Netherlands for the use of the United States, and the payment of which he had guaranteed. This sum was to be paid in Paris, in ten annual instalments of one million of livres each, commencing on the 5th of November, 1787. The interest on this loan was payable in Paris immediately, and the first payment of interest became due on the 5th of November, 1782. There was also due to the Farmers-General of France one million of livres, and to the king six millions of livres, on a loan for the year 1783; making in the whole thirty-eight millions of livres, or \$7,037,037, due in France. There was also due to money-lenders in Holland \$671,000; for money borrowed by Mr. Jay in Spain, \$150,000; and a year's interest on the Dutch loan of ten millions of livres, amounting to \$26,848;—making the whole foreign debt \$7,885,085. The domestic debt amounted to \$34,115,290. Five millions of this were due to the army, under the commutation resolves of March, 1783. The residue was held by other citizens, or consisted of arrears of interest. The whole

The Confederation had no sooner gone into operation than it was perceived, by many of the principal statesmen of the country, that its financial powers were so entirely defective that Congress would never be able, under them, to pay even the interest on the public debt. Indeed, before the Confederation was finally ratified, so as to become obligatory upon all the states, on the 3d of February, 1781, Congress passed a resolve, recommending to the several states, as indispensably necessary, to vest a power in Congress to levy for the use of the United States a duty of five per cent. *ad valorem*, at the time and place of importation, upon all foreign goods and merchandise imported into any of the states; and that the money arising from such duties should be appropriated to the discharge of the principal and interest of the debts already then contracted, or which might be contracted, on the faith of the United States, for the support of the war; the duties to be continued until the debt should be fully and finally discharged.

It was at this time that the office of Superintendent of the Finances was established, and Robert Morris was unanimously elected by Congress to fill it. He was an eminent merchant of Philadelphia, of known financial skill, devoted to the cause of the country, and possessed of very considerable private resources, which he more than once sacrificed to the public service. Under his administration it is highly probable that, if the states had complied with the requisitions of Congress, the war would have been brought to a close at an earlier period. But there was scarcely any compliance with those requisitions, and, contemporaneously with this neglect, the proposal to vest in Congress the power to levy duties met with serious opposition. On the 30th of October, 1781, Congress made a requisition upon the states for eight millions of dollars, to meet the service of the ensuing year. In January, 1783, one year and three months from the date of this requisition, less than half a million of this sum had been received into the treasury of the United States. After a delay of nearly two years, one state entirely refused its concurrence with the plan of vesting in Congress a power to levy duties, another withdrew the assent it had once given, and a third had returned no answer.

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debt of the United States was estimated at \$42,000,375, and the annual interest of this sum was \$2,415,956.

The state which refused to grant this power to Congress was Rhode Island. On the 6th of December, 1782, Congress determined to send a deputation to that state, to endeavor to procure its assent to this constitutional change. The increasing discontents of the army, the loud clamors of the public creditors, the extreme disproportion between the current means and the demands of the public service, and the impossibility of obtaining further loans in Europe unless some security could be held out to lenders, made it necessary for Congress to be especially urgent with the legislature of Rhode Island. But, at the moment when the deputation was about to depart on this mission, the intelligence was received that Virginia had repealed the act by which she had previously granted to Congress the power of laying duties, and the proposal was therefore abandoned for a time.<sup>1</sup> But the leading persons then in Congress—who saw the ruin impending over the country; who were aware that the whole amount of money which Congress had received, to carry on the public business for the year then just expiring, was less than two millions of dollars,<sup>2</sup> while the three branches of feeding, clothing, and paying the army exceeded five millions of dollars per annum, exclusive of all other departments of the public service; and who were equally aware that no means whatever existed of paying the interest on the public debts—resolved still to persevere in their endeavors to procure the establishment of revenues equal to the purpose of funding all the debts of the United States.

Among these persons Hamilton and Madison were the most active; and the part which they took, at this period, in the measures for sustaining the sinking credit of the country, and the efforts which they made, are among the less conspicuous, but not less important services, which those great men performed for their country. Another plan was devised, after the failure of that of 1781,

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<sup>1</sup> Mr. Madison (under the date of December 24, 1782) says that, on the receipt of this intelligence, "the most intelligent members were deeply affected, and prognosticated a failure of the impost scheme, and the most pernicious effects to the character, the duration, and the interests of the Confederacy. It was at length, notwithstanding, determined to persist in the attempt for permanent revenue, and a committee was appointed to report the steps proper to be taken." *Debates in the Congress of the Confederation*, Elliot, I. 17.

<sup>2</sup> \$1,545,818<sup>3</sup>/<sub>8</sub> was the whole amount.

for investing Congress with a power to derive a revenue from duties, and, in April, 1783, its promoters procured for it the almost unanimous consent of Congress. This plan recommended the states to vest in Congress the power of levying certain duties upon goods imported into the country, partly specific and partly *ad valorem*; the proceeds of such duties to be applied to the discharge of the interest or principal of the debts incurred by the United States for supporting the war. The duties were to be collected by collectors appointed by the states, but accountable to Congress. It also recommended to the states to establish, for a term of twenty-five years, substantial and effectual revenues, exclusive of the duties to be levied by Congress for supplying their proportions of fifteen millions of dollars annually, for the same purpose; and that, when this plan had been acceded to by all the states, it should be considered as forming a mutual compact, irrevocable by one or more of them without the consent of the whole. It was also proposed that the rule of proportion fixed by the Confederation should be changed from the basis of real estate to the basis of population.

This plan was sent out to the states, accompanied by an address, prepared by Mr. Madison, in which the necessity of the measure was urged with much ability and force. Annexed to this paper were various documents, exhibiting the nature and origin of the public debts, and the meritorious characters of the various public creditors; the whole of the Newburgh Addresses, and the proceedings of the officers; the contracts made with the King of France, and a very able answer by Hamilton to the objections of Rhode Island. No stronger and more direct appeal was ever made to the sense of right of any people. Never was the cause of national honor, public faith, and public safety more powerfully and eloquently set forth.<sup>1</sup>

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<sup>1</sup> On the final question, as to the revenue system, Hamilton voted against it. His reasons were given in a letter to the Governor of New York, under date of April 14, 1783. They were, "First, that it does not designate the funds (except the impost) on which the whole interest is to arise; and by which (selecting the capital articles of visible property) the collection would have been easy, the funds productive, and necessarily increasing with the increase of the country. Secondly, that the duration of the funds is not coextensive with the debt, but limited to twenty-five years, though there is a moral certainty that in that period the principal will not, by the present provision, be fairly extinguished. Thirdly,

And when we consider the various classes of the public creditors, at the close of the war, and remember that the debts of the country had been contracted for the great purpose of establishing its independence, and that there was scarcely a creditor who had not some claim to the gratitude of the country, we cannot but be astonished that such an appeal as was then made should have fallen, as it did, unheeded upon the legislatures and people of many of the states. In the first place, the debts were due to an ally, the King of France, who had loaned to the American people his armies and his treasures; who had added to his loans liberal donations; and whose very contracts for repayment contained proof of his magnanimity. In the next place, they were due to that noble band of officers and soldiers who had fought the battles of their country, and who now asked only such a portion of their dues as would enable them to retire, with the means of daily bread, from the field of victory and glory into the bosom of peace and privacy, and such effectual security for the residue of their claims as their country was unquestionably able to provide. In the last place, they were due partly to those citizens of the country who had lent their funds to the public, or manifested their confidence in the government by receiving transfers of public se-

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that the nomination and appointment of the collectors of the revenue are to reside in each state, instead of, at least, the nomination being in the United States; the consequence of which will be, that those states which have little interest in the funds, by having a small share of the public debt due to their own citizens, will take care to appoint such persons as are the least likely to collect the revenue." Still, he urged the adoption of the plan by his own state, "because it is her interest, at all events, to promote the payment of the public debt in continental funds, independent of the general considerations of union and propriety. I am much mistaken if the debts due from the United States to the citizens of the state of New York do not considerably exceed its proportion of the necessary funds; of course, it has an immediate interest that there should be a continental provision for them. But there are superior motives that ought to operate in every state—the obligations of national faith, honor, and reputation. Individuals have been too long already sacrificed to the public convenience. It will be shocking, and, indeed, an eternal reproach to this country, if we begin the peaceable enjoyment of our independence by a violation of all the principles of honesty and true policy. It is worthy of remark, that at least four fifths of the domestic debt are due to the citizens of the states from Pennsylvania, inclusively, northward." *Life of Hamilton*, II. 185, 186.

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curities from those who had so lent, and partly to those whose property had been taken for the public service.'

The United States had achieved their independence. They were about to take rank among the nations of the world. As they should meet this crisis, their character would be determined. The rights for which they had contended were the rights of human nature. These rights had triumphed, and now formed the basis of the civil polity of thirteen independent states. The forms of republican government were therefore called upon to justify themselves by their fruits. The higher qualities of national character—justice, good faith, honor, gratitude—were called upon to display an example that would save the cause of republican liberty from reproach and disgrace.\*

But, unhappily, the establishment of peace tended to weaken the slender bond which held the Union together, by turning the attention of men to the internal affairs of their own states. The advantage and the necessity of giving the regulation of foreign commerce to the general government, if perceived at all, was perceived only by a few leading statesmen. The commercial states fancied that they profited by a condition of things which enabled them as importers to levy contributions on their neighbors. The people did not as yet perceive that, without some central authority to regulate the whole trade alike, the clashing regulations of rival states would sooner or later destroy the Confederacy. Nor were they willing to be taxed for the payment of the public debts. The people of the United States had not yet begun to feel that such a burden is to be borne as one of the first of public and social duties. That part of the financial plan of 1783 which required from the states a pledge of internal revenues for twenty-five years, met with so much opposition that Congress was obliged to abandon it, and to confine its efforts to that part of the scheme which related to the duties on imports. In 1786 all the states, except New York, had complied with the latter part of the plan; but the refusal of that state rendered the whole of it inoperative, and no resource remained to Congress, after the close of the war, but the old method of making requisitions on the states, under the rule of the Confederation.†

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\* Address.

† Ibid.

‡ With what success this was attended may be seen from the fact that, from

At the return of peace, therefore, the Confederation had had a trial of two years and six months, as a government for purposes of war. It was for these purposes, mainly, that it was established; being in fact, as it was in name, a league of friendship between sovereign states, for their common defence, the security of their liberties, and their mutual and general welfare; the parties to which had bound themselves by it to assist each other against all external attacks. Doubtless the framers of the Confederation contemplated its duration beyond the period of the war; for, besides the perpetual character of the Union, which it sought and professed to establish, it had certain functions which were manifestly to be exercised in peace as well as in war. These functions, however, were few. The government was framed during a revolutionary war, for the purposes of that war, and it went into operation while the war was still waged; taking the place and superseding the powers of the Revolutionary Congress, under which the war had been commenced and prosecuted.

A written constitution, with a precise and well-defined mode of operation, had thus succeeded to the vague and indefinite, but ample, powers of the earlier government. But in the very modes of its operation there was a monstrous defect which distorted the whole system from the true proportions and character of a government. It gave to the Confederation the power of contracting debts, and at the same time withheld from it the power of paying them. It created a corporate body, formed by the Union and known as the United States, and gave to it the faculty of borrowing money and incurring other obligations. It provided the mode in which its treasury should be supplied for the reimbursement of the public creditor. But over the sources of that supply it gave the government contracting the debts no power whatever. Thirteen independent legislatures granted or withheld the means which were to enable the general government to

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the year 1782 to the year 1786, Congress made requisitions on the states for the purpose of paying the interest on the public debts of more than six millions of dollars, and on the 31st of March, 1787, about one million only of this sum had been received. The interest of the debt due to domestic creditors remained wholly unpaid; money was borrowed in Europe to pay the interest on the foreign loans; and the domestic debt sunk to so low a value that it was often sold for one tenth of its nominal amount.



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tude—upon the connection between these sentiments and that passion for liberty which animated the earlier struggles for national independence—are exposed to great hazards. If an appeal to the feelings of a people constitutes the principal ground of security for the public creditor, other feelings may intervene, which will lead to a denial of the justice of the claim; for it is the very nature of such an appeal to submit the whole question of obligation and duty to popular determination. That government alone is likely to discharge the just obligations of any people which possesses both the power to declare what those obligations are and the power to levy the means of payment, without a reference of either point to popular sentiment.

The history of the Confederation contains abundant proofs of the soundness of this position. At the close of the war a debt of more than forty millions of dollars was due from the United States to various classes of creditors, and the whole of it had been contracted either by the government of the Confederation, or by its predecessors, for whose contracts the Confederation was expressly bound, by the articles, to provide. This debt could not be discharged without a grant of internal revenues from the states, and without a grant of the power to collect other revenues from the external trade of the country. The appeal that was made by the government in order to obtain these grants was addressed almost wholly to the moral sentiments of the people of the different states; the time had scarcely arrived, although rapidly approaching, for an appeal to those interests which were involved in the surrender to the general government of the power of regulating foreign commerce;<sup>1</sup> and consequently the arguments ad-

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<sup>1</sup> None of the documents connected with the Address to the People of the United States, issued by Congress in 1783, discussed the question as one of direct interest and advantage, except Hamilton's answer to the objections of Rhode Island. The address itself appealed entirely to considerations of honor, justice, and good faith. Hamilton's paper, however, showed with great perspicacity that the proposed impost would not be unfavorable to commerce, but the contrary; that it would not diminish the profits of the merchant, being too moderate in amount to discourage the consumption of imported goods, and therefore that it would not diminish the extent of importations; but that, even if it had this tendency, it was a tendency in the right direction, because it would lessen the proportion of imports to exports, and incline the balance in favor of

arms the people of this country owe the splendid inheritance of liberty. All real palliations should be sought for and admitted. The country was poor: no proper system of finance had been, or could be, developed by a government which had no power of taxation; and the ideas and feelings of the people of many of the states were provincial, and without the liberality and enlargement of thought which comes of intercourse with the world. But, after every apology has exhausted its force, the conscientious student of history must mark the dereliction from public duty; must admit what the public faith required; and must observe the dangerous consequences which attend, and must ever attend, the breach of a public obligation.

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fortunate that it went forth before the advent of peace, to be considered and acted upon by the states. The system of the Confederation had utterly failed to supply the means of sustaining the public credit of the Union, and the consciousness of that failure tended to produce a resolution of the Union into its component elements, the states. Men had begun to abandon the hope of paying the debts of the country, or, if they were to be paid at all, they had begun to look to the states, in their individual capacities, as the ultimate debtors, to whom at least a part of the claims was to be referred. Had the country been permitted to pass from a state of war to a state of peace, without the suggestion and proposal of a definite system for funding these debts on continental securities, the Union would at once have been exhausted of all vitality. The Confederation, left to discharge the functions which belonged to it in peace, without the power of relieving the burdens which it had entailed upon the country during the war, would have been everywhere regarded as a useless machine, the purposes of which—poorly answered in the period of its greatest activity—had entirely ceased to exist. Congress would have been attended by delegates from few of the states, if attended at all;<sup>1</sup> and the rapid decay of the Union would have been marked by the feeble, spasmodic, and unsuccessful efforts of some of them to discharge so much of the general burdens as could have been assigned to them in severalty; the open repudiation of others; and the final confusion and loss of the whole mass of the debts, in universal bankruptcy, poverty, and disgrace.

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<sup>1</sup> As it was, the approach of peace had reduced the attendance upon Congress below the constitutional number of states necessary to ratify the treaty, when it was received. On the 23d of December, 1783, a resolve was passed, "That letters be immediately despatched to the executives of New Hampshire, Connecticut, New York, New Jersey, South Carolina, and Georgia, informing them that the safety, honor, and good faith of the United States require the immediate attendance of their delegates in Congress; that there have not been during the sitting of Congress at this place [Annapolis] more than seven states represented, namely, Massachusetts, Rhode Island, Pennsylvania, Delaware, Maryland, Virginia, and North Carolina, and most of those by only two delegates; and that the ratification of the definitive treaty, and several other matters, of great national concern, are now pending before Congress, which require the utmost despatch, and to which the assent of at least nine states is necessary." Journals, IX. 12.

But the comprehensive scheme of 1783, although never adopted, saved the imperfect union that then existed from the destruction to which it was hastening. It saved it for a prolonged, though feeble existence, through a period of desperate exhaustion. It saved it, by ascertaining the debts of the country, fixing their national character, and proposing a national system for their discharge. It directed the attention of the states to the advantage and the necessity of giving up to the Union some part of the imposts that might be levied on foreign commodities, and thus led the way to that grand idea of uniformity of regulation which was afterwards developed as the true interest of communities which, from their geographical and moral relations, constitute in fact but one country.

It is not intended, however, in assigning this influence to the revenue system proposed in 1783, to suggest that it contained the germ of the present Constitution. It was an essentially different system. It proposed the enlargement of the powers of Congress, as they existed under the Confederation, only by the grant to the United States of the right to collect certain duties on foreign importations, for the limited period of twenty-five years, to be applied to the discharge of the debts contracted for the purposes of the war, but to be collected by officers appointed by the states, although amenable to Congress; and the levy and collection by the states of certain internal taxes, during the same limited term, for the purpose of raising certain proportionate sums, to be paid over to the United States, for the same object. So far, therefore, as this system suggested any new powers, there is a wide difference between its features and principles and those of an entire and irrevocable surrender to the Union of the whole subject of taxing and regulating foreign commerce. But the influence of this proposal upon the country, during the four years which followed, is to be measured by the evident necessities which it revealed, and by the means to which it pointed for their relief—means which, though never applied, and, if applied, would have proved inadequate, still showed, through the period of increasing weakness in the Union, the high obligation which rested upon the country, and which could be discharged only by the preservation of the Union.

*Note to Page 124.*

## ON THE HALF-PAY FOR THE OFFICERS OF THE REVOLUTION.

In Connecticut the opposition to the plan of enabling Congress to fund the public debts arose from the jealousy with which the provision of half-pay for the officers of the army had always been regarded in that state. In October, 1783, Governor Trumbull, in an address to the assembly declining a re-election, had spoken of the necessity of enlarging the powers of Congress, and of strengthening the arm of the government. A committee reported an answer to this address, which contained a paragraph approving of the principle which the governor had inculcated, but it was stricken out in the lower house. Jonathan Trumbull, Jr., who had been one of Washington's aids, thus wrote to him concerning the rejection of this paragraph: "It was rejected, lest, by adopting it, they should seem to convey to the people an idea of their concurring with the political sentiments contained in the address; so exceedingly jealous is the spirit of this state at present respecting the powers and the engagements of Congress, arising principally from their aversion to the half-pay and commutation granted to the army; principally, I say, arising from this cause. It is but too true, that some few are wicked enough to hope that, by means of this clamor, they may be able to rid themselves of the whole public debt, by introducing so much confusion into public measures as shall eventually produce a general abolition of the whole" (Writings of Washington, IX. 5, note). It appears from the Journals of Congress that in November, 1783, the House of Representatives of Connecticut sent some remonstrance to Congress respecting the resolution which had granted half-pay for life to the officers, which was referred to a committee, to be answered. In the report of this committee it was said that "the resolution of Congress referred to appears by the yeas and nays to have been passed according to the then established rules of that body in transacting the business of the United States; the resolution itself had public notoriety, and does not appear to have been formally objected against by the legislature of any state till after the Confederation was completely adopted, *nor till after the close of the war.*" These words were stricken out from the report by a vote of six states against one, two states declining to vote. The journal gives no further account of the matter. (Journals, IX. 79. March 12, 1784.)

In Massachusetts the half-pay had always been equally unpopular. The legislature of that state, on the 11th of July, 1783, addressed a letter to Congress, to assign, as a reason for not agreeing to the impost duty, the grant of half-pay to the officers. The tone of this letter does little credit to the state.

*"Commonwealth of Massachusetts.*

*"BOSTON, July 11, 1783.*

"SIR,—The Address of the United States in Congress assembled has been received by the legislature of the Commonwealth of Massachusetts; and, while they consider themselves as bound in duty to give Congress the highest assur-

ance that no measures consistent with their circumstances, and the Constitution of this government and the Federal Union, shall remain unattempted by them to furnish those supplies which justice demands, and which are necessary to support the credit and honor of the United States, they find themselves under a necessity of addressing Congress in regard to the subject of the half-pay of the officers of the army, and the proposed commutation thereof; with some other matters of a similar nature, which produce among the people of this commonwealth the greatest concern and uneasiness, and involve the legislature thereof in no small embarrassments. The legislature have not been unacquainted with the sufferings, nor are they forgetful of the virtue and bravery, of their fellow-citizens in the army; and while they are sensible that justice requires they should be fully compensated for their services and sufferings, at the same time it is most sincerely wished that they may return to the bosom of their country under such circumstances as may place them in the most agreeable light with their fellow-citizens. Congress, in the year 1780, resolved that the officers of the army, who should continue therein during the war, should be entitled to half-pay for life; and at the same time resolved that all such as should retire therefrom, in consequence of the new arrangement which was then ordered to take place, should be entitled to the same benefit; a commutation of which half-pay has since been proposed. The General Court are sensible that the United States in Congress assembled are, by the Confederation, vested with a discretionary power to make provision for the support and payment of the army, and such civil officers as may be necessary for managing the general affairs of the United States; but in making such provision, due regard ever ought to be had to the welfare and happiness of the people, the rules of equity, and the spirit and general design of the Confederation. We cannot, on this occasion, avoid saying, that, with due respect, we are of opinion those principles were not duly attended to, in the grant of half-pay to the officers of the army; that being, in our opinion, a grant of more than an adequate reward for their services, and inconsistent with that equality which ought to subsist among citizens of free and republican states. Such a measure appears to be calculated to raise and exalt some citizens in wealth and grandeur, to the injury and oppression of others, even if the inequality which will happen among the officers of the army, who have performed from one to eight years' service, should not be taken into consideration. The observations which have been made with regard to the officers of the army will in general apply to the civil officers appointed by Congress, who, in our opinion, have been allowed much larger salaries than are consistent with the state of our finances, the rules of equity, and a proper regard to the public good. And, indeed, if the United States were in the most wealthy and prosperous circumstances, it is conceived that economy and moderation, with respect to grants and allowances, in opposition to the measures which have been adopted by monarchical and luxurious courts, would most highly conduce to our reputation, even in the eyes of foreigners, and would cause a people, who have been contending with so much ardor and expense for republican constitutions and freedom, which cannot be supported without frugality and virtue, to

appear with dignity and consistency; and at the same time would, in the best manner, conduce to the public happiness. It is thought to be essentially necessary, especially at the present time, that Congress should be expressly informed that such measures as are complained of are extremely opposite and irritating to the principles and feelings which the people of some Eastern States, and of this in particular, inherit from their ancestry. The legislature cannot without horror entertain the most distant idea of the dissolution of the Union which subsists between the United States, and the ruin which would inevitably ensue thereon; but with great pain they must observe that the extraordinary grants and allowances which Congress have thought proper to make to their civil and military officers have produced such effects in this commonwealth as are of a threatening aspect. From these sources, and particularly from the grant of half-pay to the officers of the army, and the proposed commutation thereof, it has arisen that the General Court has not been able hitherto to agree in granting to the United States an impost duty, agreeable to the recommendation of Congress; while the General Assembly at the same time have been deeply impressed with a sense of the necessity of speedily adopting some effectual measures for supplying the continental treasury, for the restoration of the public credit, and the salvation of the country; and propose, as the present session is near terminating, again to take the subject of the impost duty into consideration early in the next. From these observations you may easily learn the difficult and critical situation the legislature is in, and they rely on the wisdom of Congress to adopt and propose some measure for relief in this extremity.

"In the name and by order of the General Court,

"We are your Excellency's most obedient servants,

"SAMUEL ADAMS,

*President of the Senate.*

"TRISTRAM DALTON,

*Speaker of the House of Representatives.*

"HIS EXCELLENCY THE PRESIDENT OF CONGRESS."

This letter was thought worthy an answer, and accordingly a report upon it was brought in by Mr. Madison, and adopted in Congress, containing among other things the following:

"Your committee consider the measure of Congress as the result of a deliberate judgment, framed on a general view of the interests of the Union at large. They consider it to be a truth, that no state in this Confederacy can claim (more equitably than an individual in a society) to derive advantages from a union, without conforming to the judgment of a constitutional majority of those who compose it; still, however, they conceive it will be found no less true, that, if a state every way so important as Massachusetts should withhold her solid support to constitutional measures of the Confederacy, the result must be a dissolution of the Union; and then she must hold herself as alone responsible for the anarchy and domestic confusion that may succeed, and for exposing all these confederated states (who at the commencement of the late war



leagued to defend her violated rights) an easy prey to the machinations of their enemies and the sport of European politics; and therefore they are of opinion that Congress should still confide that a free, enlightened, and generous people will never hazard consequences so perilous and alarming, and in all circumstances rely on the wisdom, temper, and virtue of their constituents, which (guided by an all-wise Providence) have ever interposed to avert impending evils and misfortunes. Your committee beg leave further to observe that, from an earnest desire to give satisfaction to such of the states as expressed a dislike to the half-pay establishment, a sum in gross was proposed by Congress, and accepted by the officers, as an equivalent for their half-pay. That your committee are informed that such equivalent was ascertained on established principles which are acknowledged to be just, and adopted in similar cases; but that if the objections against the commutation were ever so valid, yet, as it is not now under the arbitration of Congress, but an act finally adopted, and the national faith pledged to carry it into effect, they could not be taken into consideration. With regard to the salaries of civil officers, it may be observed that the necessities of life have been very high during the war; hence it has happened that even the salaries complained of have not been found sufficient to induce persons properly qualified to accept of many important offices, and the public business is left undone." (Journals of Congress, VIII. 379-385. September 25, 1783.)

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*Note to page 124.*

ON THE NEWBURGH ADDRESSES.

There was a period in this business when the officers would have accepted from Congress a recommendation to their several states for the payment of their dues. Their committee, consisting of General McDougall, Colonel Brooks of Massachusetts, and Colonel Ogden of New Jersey, arrived in Philadelphia about the 1st of January. In their memorial to Congress they abstained from designating the funds from which they desired satisfaction of their demands, because their great object was to get a settlement of their accounts and an equivalent for the half-pay established. But they were, in fact, at one time, impressed with the belief that their best, and indeed their only security, was to be sought for in funds to be provided by the states, under the recommendation of Congress. This plan would have involved a division of the army into thirteen different parts, leaving the claims of each part to be satisfied by its own state; a course that would unquestionably have led to the rejection of their demands in some states, and probably in many. To prevent this, there is little doubt that the influence of those members of Congress who wished to promote their interests, and to identify them with the interests of the other public creditors, was used; and by the middle of February the committee of the officers became satisfied that the army must unitedly pursue a common object, insisting on the grant of revenues to the general government, adequate to the liquidation

of all the public debts. (Letter of Gouverneur Morris to General Greene, February 15, 1788. *Life*, by Sparks, I. 250.) The point, however, which they continued to urge, was the commutation; and upon this they encountered great obstacles. The committee of Congress to whom their memorial was referred went into a critical examination of the principles of annuities, in order to determine on an equivalent for the half-pay for life, promised by the resolve of 1780. The result was a report declaring that six years' full pay was the proper equivalent. This report was followed by a declaratory resolve, which was passed, "that the troops of the United States, in common with all the creditors of the same, have an undoubted right to expect security; and that Congress will make every effort to obtain, from the respective states, substantial funds, adequate to the object of funding the whole debt of the United States, and will enter upon an immediate and full consideration of the nature of such funds, and the most likely mode of obtaining them." The remainder of the report, however, was referred to a new committee of five, the number of years being considered too many. The second committee reported five years' whole pay as an equivalent, after another calculation of annuities; but the approval of nine states could not be obtained. A desire was then expressed by some of the members, who were opposed both to the commutation and the half-pay, to have more time for consideration, and this was granted.

This was the position of the matter on the 8th of February, when the committee of the officers wrote to General Knox on the part of the army. They stated that "Massachusetts, New York, Pennsylvania, Virginia, North and South Carolina were for the equivalent; New Hampshire, Rhode Island, Connecticut, and Jersey against it. There is some prospect of getting one more of these states to vote for the commutation. If this is accomplished, with Maryland and Delaware, the question will be carried; whenever it is, as the report now stands, it will be at the election of the line, as such, to accept of the commutation or retain their claim to the half-pay, Congress being determined that no alteration shall take place in the emolument held out to the army but by their consent. This rendered it unnecessary for us to consult the army on the equivalent for half-pay. The zeal of a great number of members of Congress to get continental funds, while a few wished to have us referred to the states, induced us to conceal what funds we wished or expected, lest our declaration for one or the other might retard a settlement of our accounts, or a determination on the equivalent for half-pay. Indeed, some of our best friends in Congress declared, however desirous they were to have our accounts settled, and the commutation fixed, as well as to get funds, yet they would oppose referring us to the states for a settlement and security, till all prospect of obtaining continental funds was at an end. Whether this is near or not, as commutation for the half-pay was one of the principal objects of the address, the obtaining of that is necessary, previous to our particularizing what fund will be most agreeable to us: this must be determined by circumstances. If Congress get funds, we shall be secured. If not, the equivalent settled, a principle will be established, which will be more acceptable to the Eastern States than half-pay, if application must

be made to them. As it is not likely that Congress will be able to determine soon on the commutation (for the reasons above mentioned), it is judged necessary that Colonel Brooks return to the army, to give them a more particular detail of our prospects than can be done in the compass of a letter." (Writings of Washington, VIII. 553, 554.)

Two classes of persons existed at this time in Congress, of very different views; the one attached to state, the other to continental politics; the one strenuous advocates for funding the public debts upon solid securities, the other opposed to this plan, and finally yielding to it only in consequence of the clamors of the army and the other public creditors. The advocates for continental funds, convinced that nothing could be done for the public credit by any other measures, determined to blend the interests of the army and those of the other creditors in their scheme, in order to combine all the motives that could operate upon different descriptions of men in the different states. Washington, who naturally regarded the interests of the army as the first object in point of importance, and who had not given his attention so much to the general financial affairs of the country, seems to have thought it inadvisable to bring the claims of the army before the states, in connection with the other public debts. On the 4th of March he wrote to Hamilton (then in Congress) that "the just claims of the army ought, and it is to be hoped will, have their weight with every sensible legislature in the United States, if Congress point to their demands, and show, if the case is so, the reasonableness of them, and the impracticability of complying with them without their aid. In any other point of view, it would in my opinion be impolitic to introduce the army on the tapis, lest it should excite jealousy and bring on its concomitants. The states surely cannot be so devoid of common sense, common honesty, and common policy, as to refuse their aid on a full, clear, and candid representation of facts from Congress; more especially if these should be enforced by members of their own body, who might demonstrate what the inevitable consequences of failure will lead to." (Writings, VIII. 390.)

But while the advocates of the continental system were maturing their plans new difficulties arose, in consequence of the proceedings of the officers at Newburgh, and of the jealousies which the army began to entertain. Among the resolutions adopted by the officers was one which expressed their unshaken confidence in the justice of Congress and the country, and their conviction that Congress would not disband them until their accounts had been liquidated and adequate funds established for their payment. But Congress had no constitutional power, under the Confederation, to demand funds of the states; and to determine that the army should be continued in service until the states granted the funds, which it was intended to recommend, would be to determine that it should remain a standing army in time of peace, until the states should comply with the recommendation. On the other hand, Congress had no present means of paying the army, if they were to disband them. This dilemma rendered it necessary to evade for a short time any explicit declaration of the purposes of Congress as to disbanding the army; and hence arose a jealousy,

on the part of the army, that they were to be used as mere puppets to operate upon the country in favor of a general revenue system. Washington himself communicated the existence of these suspicions to Hamilton, on the 4th of April, advising that the army should be disbanded as soon as possible, consulting its wishes as to the mode. He also intimated that the Superintendent of the Finances, Robert Morris, was suspected to be at the bottom of the scheme of keeping the army together, for the purpose of aiding the adoption of the revenue system.

Hamilton's reply explains the position of the whole matter, and the motives and purposes of those with whom he acted. "But the question was not merely how to do justice to the creditors, but how to restore public credit. Taxation in this country, it was found, could not supply a sixth part of the public necessities. The loans in Europe were far short of the balance, and the prospect every day diminishing; the court of France telling us, in plain terms, she could not even do as much as she had done; individuals in Holland, and everywhere else, refusing to part with their money on the precarious tenure of the mere faith of this country, without any pledge for the payment either of principal or interest. In this situation, what was to be done? It was essential to our cause that vigorous efforts should be made to restore public credit; it was necessary to combine all the motives to this end that could operate upon different descriptions of persons in the different states. The necessity and discontents of the army presented themselves as a powerful engine. But, sir, these gentlemen would be puzzled to support their insinuations by a single fact. It was indeed proposed to appropriate the intended impost on trade to the army debt, and, what was extraordinary, by gentlemen who had expressed their dislike to the principle of the fund. I acknowledge I was one that opposed this, for the reasons already assigned, and for these additional ones: *that* was the fund on which we most counted to obtain further loans in Europe; it was necessary we should have a fund sufficient to pay the interest of what had been borrowed and what was to be borrowed. The truth was, these people in this instance wanted to play off the army against the funding system. As to Mr. Morris, I will give your Excellency a true explanation of his conduct. He had been for some time pressing Congress to endeavor to obtain funds, and had found a great backwardness in the business. He found the taxes unproductive in the different states; he found the loans in Europe making a very slow progress; he found himself pressed on all hands for supplies; he found himself, in short, reduced to this alternative—either of making engagements which he could not fulfil, or declaring his resignation in case funds were not established by a given time. Had he followed the first course, the bubble must soon have burst; he must have sacrificed his credit and his character, and *public* credit, already in a ruined condition, would have lost its last support. He wisely judged it better to resign; this might increase the embarrassments of the moment, but the necessity of the case, it was to be hoped, would produce the proper measures, and he might then resume the direction of the machine with advantage and success. He also had some hope that his resignation would prove a stimulus to Congress.

He was, however, ill-advised in the publication of his letters of resignation. This was an imprudent step, and has given a handle to his personal enemies, who, by playing upon the passions of others, have drawn some well-meaning men into the cry against him. But Mr. Morris certainly deserves a great deal from his country. I believe no man in this country but himself could have kept the money machine going during the period he has been in office. From everything that appears, his administration has been upright as well as able. The truth is, the old leaven of Deane and Lee is at this day working against Mr. Morris. He happened in that dispute to have been on the side of Deane, and certain men can never forgive him. . . . The matter, with respect to the army, which has occasioned most altercation in Congress, and most dissatisfaction in the army, has been the half-pay. The opinions on this head have been two: one party was for referring the several lines to their states, to make such commutation as they should think proper; the other, for making the commutation by Congress, and funding it on continental security. I was of this last opinion, and so were all those who will be represented as having made use of the army as our puppets. Our principal reasons were: First, by referring the lines to their respective states, those which were opposed to the half-pay would have taken advantage of the officers' necessities to make the commutation short of an equivalent. Secondly, the inequality which would have arisen in the different states when the officers came to compare (as has happened in other cases) would have been a new source of discontent. Thirdly, such a reference was a continuance of the old, wretched state system, by which the ties between Congress and the army have been nearly dissolved—by which the resources of the states have been diverted from the common treasury and wasted: a system which your Excellency has often justly reprobated. I have gone into these details to give you a just idea of the parties in Congress. I assure you, upon my honor, sir, I have given you a candid statement of facts, to the best of my judgment. The men against whom the suspicions you mention must be directed, are in general the most sensible, the most liberal, the most independent, and the most respectable characters in our body, as well as the most unequivocal friends to the army; in a word, they are the men who think continentally." (*Life of Hamilton*, II. 162-164.)

Among the officers mentioned in the text, at page 113, as seconding the exertions of Washington in putting down the Newburgh disturbances, the reader will have observed the name of Putnam. This was Rufus Putnam, who had served as a colonel through the war, and had been made a brigadier-general about three months before this occurrence. General Israel Putnam was never with the army after December, 1779, at which time he suffered a paralysis.

## CHAPTER IX.

1781-1783.

### OPINIONS AND EFFORTS OF WASHINGTON AND OF HAMILTON.—DECLINE OF THE CONFEDERATION.

THE proposal of the revenue system went forth to the country, although not in immediate connection, yet nearly at the same time, with those comprehensive and weighty counsels which Washington addressed to the states, when the great object for which he had entered the service of his country had been accomplished, and he was about to return to a private station. His relations to the people of this country had been peculiar. He had been, not only the leader of their armies, but, in a great degree, their civil counsellor; for although he had rarely, if ever, gone out of the province of his command to give shape or direction to constitutional changes, yet the whole circumstances of that command had constantly placed him in contact with the governments of the states, as well as with the Congress; and he had often been obliged to interpose the influence of his own character and opinions with all of them, in order that the civil machine might not wholly cease to move. At the moment when he was about to lay aside the sword, he saw very clearly that there were certain principles of conduct which must be called into action in the states, and among the people of the states, for the preservation of the Union. He, and he alone, could address to them with effect the requisite words of admonition, and point out the course of safety and success. This great service, the last act of his revolutionary official life, was performed with all the truth and wisdom of his character, before he proceeded to resign into the hands of Congress the power which he had held so long, and which he now surrendered with a virtue, a dignity, and a sincerity with which no such power has ever been laid down by any of the leaders of revolutions whom the world has seen.

His object in this address was not so much to urge the adoption of particular measures, as to inculcate principles which he believed to be essential to the welfare of the country. So clearly, however, did it appear to him that the honor and independence of the country were involved in the adoption of the revenue system which Congress had recommended, that he did not refrain from urging it as the sole means by which a national bankruptcy could be averted, before any different plan could be proposed and adopted.

But how far, at this time, any other or further plans for the formation of a better constitution had been formed, or how far any one perceived both the vicious principle of the Confederation and the means of substituting for it another and more efficient power, we can judge only by the published writings of the Revolutionary statesmen. It is quite certain that at this period Washington saw the defects of the Confederation, as he had seen them clearly, and suffered under them, from the beginning. He saw that in the powers of the states, which far exceeded those of the Continental Congress, lay the source of all the perplexities which he had experienced in the course of the war, and of almost the whole of the difficulties and distresses of the army; and that to form a new constitution, which would give consistency, stability, and dignity to the Union, was the great problem of the time. He saw, also, that the honor and true interest of this country were involved in the development of continental power; that local and state politics were destined to interfere with the establishment of any more liberal and extensive plan of government, which the circumstances of the country required, as they had perpetually weakened the bond by which the Union had thus far been held together; and that such local influences would make these states the sport of European policy. He predicted, moreover, that the country would reach, if it reached at all, some system of sufficient capabilities, only through mistakes and disasters, and through an experience purchased at the price of further difficulties and distress. Such were his general views at the close of the war.<sup>1</sup>

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<sup>1</sup> Letter to Hamilton, March 31, 1783. Writings, VIII. 409. Letter to Lafayette, April 5, 1783. Ibid. 411. Address to the States, June 5, 1783. Ibid. 439.

But there was one man in the country who had looked more deeply still into its wants, and who had formed in his enlarged and comprehensive mind the clearest view of the means necessary to meet them, even before the Confederation had been practically tried. A reorganization of the government had engaged the attention of Hamilton as early as 1780; and, with his characteristic penetration and power, he saw and suggested what should be the remedy.

He entertained the opinion at this time, as he had always entertained it, that the discretionary powers originally vested in Congress for the safety of the states, and implied in the circumstances and objects of their assembling, were fully competent to the public exigencies. But their practice, from the time of the Declaration of Independence through all the period that preceded the establishment of the Confederation, had accustomed the country to doubts of their original authority, and had at last amounted to a surrender of the ground from which they might have exercised it. No remedy, therefore, remained applicable to the circumstances, and capable of rescuing the affairs of the country from their deplorable situation, but to vest in Congress, expressly and by a direct grant, the powers necessary to constitute an efficient government and a solid, coercive union. The project then before the country, in the Articles of Confederation, had been designed to accomplish what the revolutionary government had failed to do. But it was manifestly destined to fail in its turn; for it left an uncontrollable sovereignty in the states, capable of defeating the beneficial exercise of the very powers which it undertook to confer upon Congress. It made the army, not a unit, formed and organized by a central and supreme authority, and looking up to that authority alone, but a collection of several armies, raised by the several states. It gave to the state legislatures the effective power of the purse by withholding all certain revenues from Congress. It proposed to introduce no method and energy of administration; and, without an executive, it left every detail of government to be managed by a deliberative body, whose constitution rendered it fit for none but legislative functions.

Under these circumstances, it was Hamilton's advice, before the Confederation took effect, that Congress should plainly, frankly, and unanimously confess to the states their inability to carry on



the contest with Great Britain without more ample powers than those which they had for some time exercised, or those which they could exercise under the Confederation; and that a convention of all the states be immediately assembled, with full authority to agree upon a different system. He suggested that a complete sovereignty should be vested in Congress, except as to that part of internal police which relates to the rights of property and life among individuals, and to raising money by internal taxes, which he admitted should be regulated by the state legislatures. But in all that relates to war, peace, trade, and finance he maintained that the sovereignty of Congress should be complete; that it should have the entire management of foreign affairs, and of raising and officering armies and navies; that it should have the entire regulation of trade, determining with what countries it should be carried on, laying prohibitions and duties, and granting bounties and premiums; that it should have certain perpetual revenues of an internal character in specific taxes; that it should be authorized to institute admiralty courts, coin money, establish banks, appropriate funds, and make alliances offensive and defensive, and treaties of commerce. He recommended also that Congress should immediately organize executive departments of foreign affairs, war, marine, finance, and trade, with great officers of state at the head of each of them.'

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<sup>1</sup> These suggestions were made by Hamilton in a letter of great ability, written in 1780, while he was still in the army, to James Duane, a member of Congress from New York. It was not published until it appeared in his *Life*, I. 284. At its close he says: "I am persuaded a solid confederation, a permanent army, a reasonable prospect of subsisting it, would give us treble consideration in Europe, and produce a peace this winter. *If a convention is called, the minds of all the states and the people ought to be prepared to receive its determinations by sensible and popular writings*, which should conform to the views of Congress. There are epochs in human affairs when *novelty* is useful. If a general opinion prevails that the old way is bad, whether true or false, and this obstructs or relaxes the operations of the public service, a change is necessary, if it be but for the sake of change. This is exactly the case now. 'Tis an universal sentiment that our present system is a bad one, and that things do not go right on this account. The measure of a convention would revive the hopes of the people and give a new direction to their passions, which may be improved in carrying points of substantial utility. The Eastern States have already pointed out this mode to Congress: they ought to take the hint and anticipate the others." What is here said of the action of the Eastern States probably refers, not to any suggestion

Hamilton's entry into Congress in 1782 marks the commencement of his public efforts to develop the idea of a general government, whose organs should act directly and without the intervention of any state machinery. He first publicly propounded this idea in the paper which he prepared, as chairman of a committee, to be addressed to the Legislature of Rhode Island, in answer to the objections of that state to the revenue system proposed in 1781. One of these objections was that the plan proposed to introduce into the state officers unknown and unaccountable to the state itself, and, therefore, that it was against its constitution. From the prevalence of this notion we may see how difficult it was to create the idea of a national sovereignty that would consist with the sovereignty of the states, and would work in its appropriate sphere harmoniously with the state institutions, because directed to a different class of objects. The nature of a federal constitution was little understood. It was apparent that the exercise of its powers must affect the internal police of its component members to some extent; but it was not well understood that political sovereignty is capable of partition, according to the character of its subjects, so that powers of one class may be imparted to a federal, and powers of another class remain in a state constitution without destroying the sovereignty of the latter. Hamilton presented this view, and at the same time pointed out that, unless the constitution of a state expressly prohibited its legislature from granting to the federal government new power to appoint officers for a special purpose, to act within the state itself, it was competent to the legislative authority of the state to communicate such power, just as it was competent to it originally to enter into the Confederation.<sup>1</sup>

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of a convention to revise the powers of the general government, but to a convention of committees of the Eastern States, which first assembled at Hartford and afterwards at Boston, in November, 1779, and in August, 1780, *for regulating the prices of commodities*. Journals of Congress, V. 406; VI. 271, 331, 392. But the writer may have had in his mind the convention which had just assembled in Massachusetts to form the constitution of that state. I am aware of no public proposal, as early as 1780, of a general convention to remodel the Confederacy.

<sup>1</sup> "It is not to be presumed," he said, "that the constitution of any state means to define and fix the precise numbers and descriptions of all officers to be permitted in the state, excluding the creation of any new ones, whatever might be the

In the same paper also he urged the necessity of vesting the appointment of the collectors of the proposed revenue in the general government, because it was designed as a security to credit-

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necessity derived from that variety of circumstances incident to all political institutions. The legislature must always have a discretionary power of appointing officers not expressly known to the constitution, and this power will include that of authorizing the federal government to make the appointments in cases where the general welfare may require it. The denial of this would prove too much; to wit, that the power given by the Confederation to Congress to appoint all officers in the post-office was illegal and unconstitutional. The doctrine advanced by Rhode Island would perhaps prove also that the federal government ought to have the appointment of no internal officers whatever; a position that would defeat all the provisions of the Confederation and all the purposes of the Union. The truth is that no federal constitution can exist without powers that in their exercise affect the internal police of the component members. It is equally true that no government can exist without a right to appoint officers for those purposes which proceed from and centre in itself; and, therefore, the Confederation has expressly declared that Congress shall have authority to appoint all such 'civil officers as may be necessary for managing the general affairs of the United States under their direction.' All that can be required is that the federal government confine its appointments to such as it is empowered to make by the original act of union, or by the subsequent consent of the parties; unless there should be express words of exclusion in the constitution of a state, there can be no reason to doubt that it is within the compass of legislative discretion to communicate that authority. The propriety of doing it upon the present occasion is founded on substantial reasons. The measure proposed is a measure of necessity. Repeated experiments have shown that the revenue to be raised within these states is altogether inadequate to the public wants. The deficiency can only be supplied by loans. Our applications to the foreign powers on whose friendship we depend have had a success far short of our necessities. The next resource is to borrow from individuals. These will neither be actuated by generosity nor reasons of state. 'Tis to their interest alone we must appeal. To conciliate this, we must not only stipulate a proper compensation for what they lend, but we must give security for the performance. We must pledge an ascertained fund, simple and productive in its nature, general in its principle, and at the disposal of a single will. There can be little confidence in a security under the constant revisal of thirteen different deliberatives. It must, once for all, be defined and established on the faith of the states, solemnly pledged to each other, and not revocable by any without a breach of the general compact. 'Tis by such expedients that nations whose resources are understood, whose reputations and governments are erected on the foundation of ages, are enabled to obtain a solid and extensive credit. Would it be reasonable in us to hope for more easy terms who have so recently assumed our rank among the nations? Is

ors, and must, therefore, be general in its principle and dependent on a single will, and not on thirteen different authorities. This was the earliest suggestion of the principle that, in exercising its powers, the federal government ought to act directly, through agents of its own appointment, and thus be independent of state negligence or control. When the debate came on in January, 1783, upon the new project of a revenue system, he again urged the necessity of strengthening the federal government through the influence of officers deriving their appointments directly from Congress—a suggestion that was received at the moment with pleasure by the opponents of the scheme, because it seemed to disclose a motive calculated to touch the jealousy rather than to propitiate the favor of the states. But the temporary expedients of the moment always pass away. The great ideas of a statesman like Hamilton, earnestly bent on the discovery and inculcation of truth, do not pass away. Wiser than those by whom he was surrounded, with a deeper knowledge of the science of government and the wants of the country than most of them, and constantly enunciating principles which extended far beyond the temporizing

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it not to be expected that individuals will be cautious in lending their money to a people in our circumstances, and that they will at least require the best security we can give? We have an enemy vigilant, intriguing, well acquainted with our defects and embarrassments. We may expect that he will make every effort to instil diffidences into individuals, and in the present posture of our internal affairs he will have too plausible ground on which to tread. Our necessities have obliged us to embrace measures, with respect to our public credit, calculated to inspire distrust. The prepossessions on this article must naturally be against us, and it is therefore indispensable we should endeavor to remove them by such means as will be the most obvious and striking. It was with these views Congress determined on a general fund; and the one they have recommended must, upon a thorough examination, appear to have fewer inconveniences than any other. It has been remarked, as an essential part of the plan, that the fund should depend on a single will. This will not be the case unless the collection, as well as the appropriation, is under the control of the United States; for it is evident that, after the duty is agreed upon, it may, in a great measure, be defeated by an ineffectual mode of levying it. The United States have a common interest in a uniform and equally energetic collection; and not only policy, but justice to all the parts of the Union, designates the utility of lodging the power of making it where the interest is common. Without this, it might in reality operate as a very unequal tax." *Journals of Congress*, VIII. 158.

policy of the hour, the smiles of his opponents only prove to posterity how far he was in advance of them.<sup>1</sup>

The efforts of Hamilton to effect a change in the rule of the Confederation as to the ratio of contribution by the states to the treasury of the Union also evince both the defects of the existing government and the foresight with which he would have obviated them, if he could have been sustained. The rule of the Confederation required that the general treasury should be supplied by the several states in proportion to the value of all lands within each state, granted or surveyed, with the buildings and improvements thereon, to be estimated according to such mode as Congress should from time to time direct and appoint; the taxes for paying such proportion to be laid and levied by the state legislatures within the time fixed by Congress. But Congress had never appointed any mode of ascertaining the valuation of lands within the states. The first requisition called for after the Confederation took effect was apportioned among the several states without any valuation, provision being made by which each state was to receive interest on its payments, as far as they exceeded what might afterwards be ascertained to be its just proportion, when the valuation should have been made.<sup>2</sup> At the outset, therefore, a practical inequality was established, which gave rise to complaints and jealousies between the states, and increased the disposition to withhold compliance with the requisitions. The dangerous crisis in the internal affairs of the country which attended the approach of peace had arrived in the winter and spring of 1783, and nothing had ever been done to carry out the rule of the Confederation

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<sup>1</sup> He said, as an additional reason for the revenue being collected by officers under the appointment of Congress, that, "as the energy of the federal government was evidently short of the degree necessary for pervading and uniting the states, it was expedient to introduce the influence of officers deriving their emoluments from, and consequently interested in supporting, the power of Congress." Upon this Mr. Madison observes: "This remark was imprudent, and injurious to the cause it was intended to serve. This influence was the very source of jealousy which rendered the states averse to a revenue under collection, as well as appropriation, of Congress. All the members of Congress who concurred in any degree with the states in this jealousy smiled at the disclosure. Mr. Bland, and still more Mr. Lee, who were of this number, took notice, in private conversation, that Mr. Hamilton had let out the secret." *Elliot's Debates*, I. 85.

<sup>2</sup> March 18 and 23, 1781. *Journals*, VII. 56, 67.

by fixing upon a mode of valuation. When the discussion of the new measures for sustaining the public credit came on, three courses presented themselves with regard to this part of the subject: either, first, to change the principle of the Confederation entirely; or, secondly, to carry it out by fixing a mode of valuation at once; or, thirdly, to postpone the attempt to carry it out until a better mode could be devised than the existing state of the country then permitted.

Hamilton's preference was for the first of these courses, as the one that admitted of the application of those principles of government which he was endeavoring to introduce into the federal system; for he saw that in the theory of the Confederation there was an inherent inequality which would constantly increase in practice, and which must either be removed or destroy the Union. He maintained that, where there are considerable differences in the relative wealth of different communities, the proportion of those differences can never be ascertained by any common measure; that the actual wealth of a country, or its ability to pay taxes, depends on an endless variety of circumstances, physical and moral, and cannot be measured by any one general representative, as *land* or *numbers*; and therefore that the assumption of such a general representative, by whatever mode its local value might be ascertained, would work inevitable inequality. In his view, the only possible way of making the states contribute to the general treasury in an equal proportion to their means was by general taxes imposed under continental authority; and it is a striking proof of the comprehensive sagacity with which he looked forward, that, while he admitted that this mode would, for a time, produce material inequalities, he foresaw that balancing of interests which would arise in a continental legislation, and would relieve the hardships of one tax in a particular state by the lighter pressure of another bearing with proportional weight in some other part of the Confederacy.<sup>1</sup>

Accordingly, after an attempt to postpone the consideration of a mode of carrying out the Confederation, he made an effort to have its principle changed, by substituting specific taxes on land and houses, to be collected and appropriated, as well as the duties,

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<sup>1</sup> Life of Hamilton, II. 50-57.

under the authority of the United States, by officers to be nominated by Congress, and approved by the state in which they were to exercise their functions, but accountable to and removable by Congress.<sup>1</sup> These ideas, however, as he himself saw, were not agreeable to the spirit of the times, and his plan was rejected. After many fruitless projects had been suggested and discussed, for making the valuation required by the Confederation—some of them proposing that it should be done by commissioners appointed by the United States, and some by commissioners appointed by the states—it was determined to propose no other change in the principle of making requisitions on the states than to substitute population in the place of land as the rule of proportion.<sup>2</sup>

Equally extensive and important were his views on the subject of a peace establishment, for which he saw the necessity of providing, as the time approached when the Confederation would necessarily be tested as a government for the purposes of peace. To adapt a constitution whose principal powers were originally designed to be exercised in a state of war to a state of peace, for

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<sup>1</sup> March 20, 1783. Journals, VIII. 157–159.

<sup>2</sup> The census was to be of "the whole number of white and other free citizens and inhabitants, of every age, sex, and condition, including those bound to servitude for a term of years, and three fifths of all other persons not comprehended in the foregoing description, except Indians, not paying taxes, in each state; which number shall be triennially taken and transmitted to the United States in Congress assembled, in such mode as they shall direct and appoint." When the Articles of Confederation were framed and adopted in Congress, a valuation of land as the rule of proportion was adopted instead of numbers of inhabitants, in consequence of the impossibility of compromising the different ideas of the Eastern and Southern States as to the rate at which slaves should be counted; the Eastern States, of course, wishing to have them counted in a near ratio to the whites, and the Southern states wishing to diminish that ratio. Numbers would have been preferred by the Southern States to land, if half their slaves only could have been taken; but the Eastern States were opposed to this estimate (Elliot's Debates, V. 79). In 1783, when it was proposed to change the rule of proportion from land to numbers, the first compromise suggested (by Mr. Wolcott, of Connecticut) was to include only such slaves as were between the ages of sixteen and sixty; this was found to be impracticable; and it was agreed on all sides that, instead of fixing the proportion by ages, it would be best to fix it in absolute numbers, and the rate of three fifths was agreed upon. Ibid., 81, 82.

which it possessed but few powers, and those not clearly defined, was a problem in the science of government of a novel character. It might prove to be an impossible task; for on applying the constitutional provisions to the real wants and necessities of the country, it might turn out that the Confederation was in some respects destitute of the capacity to provide for them; and in undertaking to carry out its actual and sufficient powers, which had never hitherto been exercised, opposition might spring up, from state jealousy and local policy, which, in the real weakness of the federal government, would be as effectual a barrier as the want of constitutional authority. Still the effort was to be made; and Hamilton approached the subject with all the sagacity and statesmanship for which he was so distinguished.

He saw that the Confederation contained provisions which looked to the continuance of the Union after the war had terminated, and that these provisions required practical application, through a machinery which had never been even framed. The Articles of Confederation vested in Congress the exclusive management of foreign relations; but the department of foreign affairs had never been properly organized. They also gave to Congress the exclusive regulation of trade and intercourse with the Indian nations; but no department of Indian affairs had been established with properly defined powers and duties. Nothing had been done to carry out the provision for fixing the standard of weights and measures throughout the United States, or to regulate the alloy and value of coin. Above all, the great question of means, military and naval, for the external and internal defence of the country during peace, for the preservation of tranquillity, the protection of commerce, the fulfilment of treaty stipulations, and the maintenance of the authority of the United States, had not been so much as touched. To regulate these important subjects was the design of a committee, at the head of which Hamilton was placed; and his earliest attention was directed to the most serious and difficult of them—the provision for a peace establishment of military and naval forces.<sup>1</sup>

The question whether the United States could constitutionally maintain an army and navy, in time of peace, was, under the Ar-

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<sup>1</sup> Life of Hamilton, II. 204-212.



ticles of Confederation, not free from difficulty ; but it became of imminent practical importance under the treaty of peace. That treaty provided for an immediate withdrawal of the British forces from all posts and fortifications within the United States ; and it became at once an important question whether these posts and fortifications—especially those within certain districts, the jurisdiction and property of which had not been constitutionally ascertained—should be garrisoned by troops of the United States, or of the states within which they were situated. There was also territory appertaining to the United States not within the original claim of the United States. The whole of the western frontier required defence. The navigation of the Mississippi and the lakes, and the rights of the fisheries and of foreign commerce, all belonging to the United States, and depending on the laws of nations and treaty stipulations, demanded the joint protection of the Union, and could not with propriety be left to the separate establishments of the states.

But the Articles of Confederation contained no express provision for the establishment and maintenance of any military and naval forces during peace. They empowered the United States, generally (and without mention of peace or war), to build and equip a navy, and to agree upon the number of land forces to be raised, and to call upon the states to furnish their quotas. But they also declared that no vessels of war should be kept up by any state in time of peace, except such number only as should be deemed necessary by Congress for the defence of such state or its trade ; and that no body of forces should be kept up by any state in time of peace, except such number only as Congress should deem requisite to garrison the posts necessary for the defence of such state. This provision might be construed to imply that, in time of peace, the general defence was to be provided for by the forces of each state, and in time of war by those of the Union. But it was the opinion of Hamilton that the restrictions on the powers of the states, with regard to maintaining forces during peace, could not with propriety be said to contain any directions to the United States, or to contravene the positive power vested in the latter to raise both sea and land forces, without mention of peace or war. He strengthened this view by the capital inconvenience of the contrary construction, and by the manifest neces-

sities of the country, which could only be provided for by the power of the Union. If the United States could have neither army nor navy until war had been declared, they would be obliged to begin to create both at the very moment when both were needed in actual hostilities; and if the states were to be intrusted with the defence of the country in time of peace, that defence would be left to thirteen different armies and navies, under the direction of as many different governments.<sup>1</sup>

He contemplated, therefore, the formation of a peace establishment, to consist of certain corps of infantry, artillery, cavalry, engineers, and dragoons;<sup>2</sup> a general survey, preparatory to the adoption of a general system of land fortifications; the establishment of arsenals and magazines, and the erection of founderies and manufactories of arms. He advised the establishment of ports and maritime fortifications, and the formation and construction of a navy; and his report embraced also a plan for classing and disciplining the militia.<sup>3</sup>

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<sup>1</sup> Life of Hamilton, II. 204-212.

<sup>2</sup> He proposed that the states should transfer to Congress the right to appoint the regimental officers, and that the men should be enlisted under Continental direction.

<sup>3</sup> That the subject of a peace establishment originated with Hamilton is certain, from the fact that early in April, soon after the appointment of the committee, he wrote to Washington, wishing to know his sentiments at large on such institutions of every kind for the interior defence of the states as might be best adapted to their circumstances (*Writings of Washington*, VIII. 417). Washington wrote to all the principal officers of the army then in camp for their views, and from the memoirs which they presented to him an important document was compiled, which was forwarded by him to the committee of Congress. In one of these memoirs Colonel Pickering suggested the establishment of a military academy at West Point. "If anything," he said, "like a military academy in America be practicable at this time, it must be grounded on the permanent military establishment of our frontier posts and arsenals, and the wants of the states, separately, of officers to command the defences of their sea-coasts. On this principle it might be expedient to establish a military school, or academy, at West Point. And that a competent number of young gentlemen might be induced to become students, it might be made a rule that vacancies in the standing regiments should be supplied from thence; those few instances excepted where it would be just to promote a very meritorious sergeant. For this end, the number which shall be judged requisite to supply vacancies in the standing regiment might be fixed, and that of the students, who are admitted with an ex-

In all this design, Hamilton pursued the purpose, which he had long entertained, of strengthening and consolidating the Union, and guarding against its dissolution, by providing the means necessary for its defence. Federal rather than state provision for the defence of every part of the Confederacy, in peace as well as in war, seemed to him essential. He thought that the general government should have exclusively the power of the sword, and that each state should have no forces but its militia.<sup>1</sup> But his great

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ception of filling them, limited accordingly. They might be allowed subsistence at the public expense. If any other youth desired to pursue the same studies at the military academy, they might be admitted, only subsisting themselves. Those students should be instructed in what is usually called military discipline, tactics, and the theory and practice of fortification and gunnery. The commandant and one or two other officers of the standing regiment, and the engineers, making West Point their general residence, would be the masters of the academy; and the inspector-general superintend the whole" (*Ibid.*). The subject of a peace establishment was made one of the four principal topics on which Washington afterwards enlarged in his circular letter to the states in June; but his suggestions related chiefly to a uniform organization of the militia throughout the states. He subsequently had several conferences with the committee of Congress on the whole subject, but nothing was done. *Vide note, infra.*

<sup>1</sup> *Life of Hamilton*, II. 214-219. The state of New York precipitated the constitutional question, by demanding that the western posts within her limits should be garrisoned by troops of her own, and by instructing her delegates in Congress to obtain a declaration, conformably to the sixth article of the Confederation, of the number of troops necessary for that purpose. Hamilton forbore to press this application while the general subject of a peace establishment was under consideration. But the doubts that arose as to the constitutional power of Congress to raise an army for the purpose of peace, and the urgency of the case, made it necessary to adopt a temporary measure with regard to the frontier posts, and to direct the commander-in-chief to garrison them with a part of the troops of the United States which had enlisted for three years. This was ordered on the 12th of May. Soon after, the mutiny of a portion of the new levies of the Pennsylvania line occurred, which drove Congress from Philadelphia to Princeton, on the 21st of June. At Princeton they remained during the residue of the year, but with diminished numbers and often without a constitutional quorum of states. In September, Washington wrote to Governor Clinton: "Congress have come to no determination yet respecting a peace establishment, nor am I able to say when they will. I have lately had a conference with a committee on this subject, and have reiterated my former opinions; but it appears to me that there is not a sufficient representation to discuss great national points; nor do I believe there will be, while that honorable body continue their sessions at

plans were arrested, partly in consequence of the doubts entertained on the point of constitutional power, and partly by reason of the great falling off of the attendance of members in Congress. At the very time when this important subject was under consideration, Congress were driven from Philadelphia, by the mutiny of a handful of men, whom they could not curb at the moment without the aid of the local authorities, and that aid was not promptly and efficiently given.<sup>1</sup>

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this place. The want of accommodation, added to a disinclination in the Southern delegates to be farther removed than they formerly were from the centre of the empire, and an aversion in the others to give up what they conceive to be a point gained by the late retreat to this place, keep matters in an awkward situation, to the very great interruption of national concerns. Seven states, it seems, by the Articles of Confederation, must agree, before any place can be fixed upon for the seat of the federal government; and seven states, it is said, never will agree; consequently, as Congress came here, here they are to remain, to the dissatisfaction of the majority and a great let to business, having none of the public offices about them, nor any place to accommodate them, if they were brought up; and the members, from this or some other cause, are eternally absent."

<sup>1</sup> Mr. Madison has given the following account of this occurrence: "On the 19th of June, Congress received information from the Executive Council of Pennsylvania that eighty soldiers, who would probably be followed by others, were on the way from Lancaster to Philadelphia, in spite of the expostulations of their officers, declaring that they would proceed to the seat of Congress and demand justice, and intimating designs against the bank. A committee, of which Colonel Hamilton was chairman, was appointed to confer with the executive of Pennsylvania, and to take such measures as they should find necessary. After a conference, the committee reported that it was the opinion of the executive that the militia of Philadelphia would probably not be willing to take arms before they should be provoked by some actual outrage; that it would hazard the authority of government to make the attempt; and that it would be necessary to let the soldiers come into the city, if the officers who had gone out to meet them could not stop them. The next day the soldiers arrived in the city, led by their sergeants, and professing to have no other object than to obtain a settlement of accounts, which they supposed they had a better chance for at Philadelphia than at Lancaster. On the 21st they were drawn up in the street before the State House, where Congress were assembled. The executive council of the state, sitting under the same roof, was called on for the proper interposition. The president of the state (Dickinson) came in and explained the difficulty of bringing out the militia of the place for the suppression of the mutiny. He thought that, without some outrages on persons or property, the militia could not be relied on. General St. Clair, then in Philadelphia, was sent for, and

Convinced, at length, that no temporary expedients would meet the wants of the country, and that a radical reform of its constitution could alone preserve the Union from dissolution, Hamilton surveyed the Confederation in all its parts, and determined to lay before the country its deep defects, with a view to the establishment of a government with proper departments and adequate powers. In this examination he applied to the Confederation the approved maxims of free government, which had been made familiar in the formation of the state constitutions, and which point to the distinct separation of the legislative, executive, and judicial functions. The Confederation vested all these powers in a single body, and thus violated the principles on which the government of nearly every state in the Union was founded. It had no federal judicature, to take cognizance of matters of general concern, and especially of those in which foreign nations and their subjects were concerned; and thus national treaties, the national faith, and the public tranquillity were exposed to the conflict of local regulations against the powers vested in the Union. It gave to Congress the power of ascertaining and appropriating the sums necessary for the public expenses, but withheld all control over either the imposition or collection of the taxes by which they were to be raised, and

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desired to use his interposition, in order to prevail on the troops to return to the barracks. But his report gave no encouragement. In this posture of things it was proposed by Mr. Izard that Congress should adjourn. Colonel Hamilton proposed that General St. Clair, in concert with the executive council of the state, should take order for terminating the mutiny. Mr. Reed moved that the general should endeavor to withdraw the mutineers, by assuring them of the disposition of Congress to do them justice. Nothing, however, was done. The soldiers remained in their position, occasionally uttering offensive words and pointing their muskets at the windows of the hall of Congress. At the usual hour of adjournment the members went out, without obstruction; and the soldiers retired to their barracks. In the evening Congress reassembled, and appointed a committee to confer anew with the executive of the state. This conference produced nothing but a repetition of the doubts concerning the disposition of the militia to act, unless some actual outrage were offered to persons or property, the insult to Congress not being deemed a sufficient provocation. On the 24th, the efforts of the state authority being despaired of, Congress were summoned by the president to meet at Trenton" (Elliot's Debates, I. 92-94). The mutiny was afterwards suppressed by marching troops into Pennsylvania under Major-General Howe. Journals, VIII. 281.

thus made the inclinations, not the abilities, of the respective states the criterion of their contributions to the common expenses of the Union. It authorized Congress to borrow money, or emit bills, on the credit of the United States, without the power of providing funds to secure the repayment of the money, or the redemption of the bills emitted.

It made no proper or competent provision for interior or exterior defence: for interior defence, because it allowed the individual states to appoint all regimental officers of the land forces, and to raise the men in their own way, while at the same time an ambiguity rendered it uncertain whether the defence of the country in time of peace was not left to the particular states, both by sea and land; for exterior defence, because it authorized Congress to build and equip a navy without providing any compulsory means of manning it.

It failed to vest in the United States a general superintendence of trade, equally necessary both with a view to revenue and regulation.

It required the assent of nine states in Congress to matters of principal importance, and of seven to all others except adjournments from day to day, and thus subjected the sense of a majority of the people of the United States to that of a minority, by putting it in the power of a small combination to defeat the most necessary measures.

Finally, it vested in the federal government the sole direction of the interests of the United States in their intercourse with foreign nations, without empowering it to pass *all general laws* in aid and support of the laws of nations; thus exposing the faith, reputation, and peace of the country to the irregular action of the particular states.<sup>1</sup>

Having thus fully analyzed for himself the nature of the existing constitution, Hamilton proposed to himself the undertaking of inducing Congress freely and frankly to inform the country of its imperfections, which made it impossible to conduct the public affairs with honor to themselves and advantage to the Union; and to recommend to the several states to appoint a convention, with full powers to revise the Confederation, and to adopt and propose

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<sup>1</sup> Life of Hamilton, II. 230-237.

such alterations as might appear to be necessary, which should be finally approved or rejected by the states.<sup>1</sup>

But he was surrounded by men who were not equal to the great enterprise of guiding and enlightening public sentiment. He was in advance of the time, and far in advance of the men of the time. He experienced the fate of all statesmen in the like position, whose ideas have had to wait the slow development of events to bring them to the popular comprehension and assent. He saw that his plans could not be adopted; and he passed out of Congress to the pursuits of private life, recording upon them his conviction that their public proposal would have failed for want of support.<sup>2</sup>

There was in fact a manifest indisposition in Congress to propose any considerable change in the principle of the government. Hence, nothing but the revenue system, with a change in the rule by which a partition of the common burdens was to be made, was publicly proposed. Although this system was a great improvement upon that of the Confederation, it related simply to revenue, in regard to which it proposed a reform, not of the principle of the government, but of the mode of operation of the old system; for it embraced only a specific pledge by the states of certain duties for a limited term, and not a grant of the unlimited power of levying duties at pleasure. There was confessedly a departure from the strict maxims of national credit, by not making the revenue coextensive with its object, and by not placing its collection in every respect under the authority charged with the management and payment of the debt which it was designed to meet.<sup>3</sup>

These relaxations were a sacrifice to the jealousies of the states; and they show that the time had not come for a change from a mere federative union to a constitutional government, founded on the popular will, and therefore acting by an energy and volition of its own.

The temper of the time was wholly unfavorable to such a change. The early enthusiasm with which the nation had rushed into the conflict with England, guided by a common impulse and

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<sup>1</sup> Life of Hamilton, II. 230-237.

<sup>2</sup> Ibid.

<sup>3</sup> See the Address to the States, accompanying the proposed revenue system, April 26, 1783, from the pen of Mr. Madison. Journals, VIII. 194-201.

animated by a national spirit, had given place to calculations of local interest and advantage; and the principle of the Confederation was tenaciously adhered to, while the events which accompanied and followed the peace were rapidly displaying its radical incapacity. The formation of the state governments, and the consequent growth and importance of state interests, which came into existence with the Confederation, and the fact that the Confederation was itself an actual diminution of the previous powers of the Union, may be considered the chief causes of the decline of a national spirit. That spirit was destined to a still further decay, until the conflict of state against state, and of section against section, by shaking the government to its foundation, should reveal both the necessity for a national sovereignty and the means by which it could be called into life.

As a consequence and proof of the decline of national power, it is worthy of observation that, at the close of the year 1783, Congress had practically dwindled to a feeble junto of about twenty persons, exercising the various powers of the government, but without the dignity and safety of a local habitation. Migrating from city to city and from state to state, unable to agree upon a seat of government, from jealousy and sectional policy; now assembling in the capitol of a state, and now in the halls of a college; at all times dependent upon the protection and even the countenance of local authorities, and without the presence of any of the great and powerful minds who led the earlier counsels of the country, this body presented a not inadequate type of the decaying powers of the Union.<sup>1</sup> At no time in the history of the

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<sup>1</sup> The first Continental Congress was called to meet at Philadelphia, that being the nearest to the centre of the Union of any of the principal cities in the United States. Succeeding congresses had been held there, with the exception of the period when the city was in the possession of the enemy, in the year 1777, until, on the 21st of June, 1783, in consequence of the mutiny of the soldiers, the president was authorized to summon the members to meet at Trenton, or Princeton, in New Jersey, "in order that further and more effectual measures may be taken for suppressing the present revolt, and maintaining the dignity and authority of the United States." On the 30th, Congress assembled at Princeton, in the halls of the college, which were tendered by its officers for their use. In August a proposition was made to return to Philadelphia, and that on the second Monday in October Congress should meet at Annapolis, unless in the meantime it had been ordered otherwise. But this was not agreed to. A



Confederation, had all the states been represented at once; and the return of peace seemed likely to reduce the entire machinery of the government to a state of complete inaction.<sup>1</sup>

The Confederation, at the close of the war, is found to have accomplished much, and also to have failed to accomplish much

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committee was then appointed (in September), "to consider what jurisdiction may be proper for Congress in the place of their permanent residence." This seems to have been followed by propositions from several of the states, from New York to Virginia inclusive, respecting a place for the permanent residence of Congress, although the Journal does not state what they were. A question was then taken (October 6), in which state buildings should be provided and erected for the residence of Congress, beginning with New Hampshire and proceeding with all the states in their order. Each state was negatived in its turn. The highest number of votes given (by states) were for New Jersey and Maryland, which had four votes each. A resolution was then carried, "that buildings for the use of Congress be erected on or near the banks of the Delaware, provided a suitable district can be procured on or near the banks of said river, for a federal town; and that the right of soil, and an exclusive or such jurisdiction as Congress may direct shall be vested in the United States;" and a committee was appointed, to repair to the falls of the Delaware, to view the country, and report a proper district for this purpose. A variety of motions then followed, for the selection of a place of temporary residence, but none was adopted. On the 17th of October, a proposition was made by a delegate of Massachusetts (Mr. Gerry) to have buildings provided for the alternate residence of Congress in two places, with the idea of "securing the mutual confidence and affection of the states, and preserving the federal balance of power;" but the question was lost. Afterwards the following resolution was agreed to: "Whereas, there is reason to expect that the providing buildings for the alternate residence of Congress in two places will be productive of the most salutary effects, by securing the mutual confidence and affections of the states; *Resolved*, That buildings be likewise erected, for the use of Congress, at or near the lower falls of the Potomac, or Georgetown, provided a suitable district on the banks of the river can be procured for a federal town, and the right of soil, and an exclusive jurisdiction, or such as Congress may direct, shall be vested in the United States; and that until the buildings to be erected on the banks of the Delaware and Potomac shall be prepared for the reception of Congress, their residence shall be alternately, at equal periods of not more than one year and not less than six months, in Trenton and Annapolis; and the president is hereby authorized and directed to adjourn Congress on the twelfth day of November next, to meet at Annapolis on the twenty-sixth day of the same month, for the despatch of public business." Journals of Congress from June to November, 1783.

<sup>1</sup> Report of a committee appointed to devise means for procuring a full representation in Congress, made November 1, 1783. Journals, VIII. 480-482.

more. It had effected the cession of the public lands to the United States; for although that cession was not completed until after the peace, still the arch on which the Union was ultimately to rest for whatever of safety and perpetuity remained for it through the four following years was deposited in its place when the Confederation was established. It had also placed the United States, as a nation, in a position to contract some alliances with foreign powers. It had finished the war; it had achieved the independence of the nation; and had given peace to the country. It had thus demonstrated the value of the Union, although its defective construction aided the development of tendencies which weakened and undermined its strength.

But its imperfect performance of the great tasks to which it had been called displayed its inherent defects. It had often been unequal to the purpose of effectually drawing forth the resources of its members for the common welfare and defence. It had often wanted an army adequate to the protection and proportioned to the abilities of the country. It had, therefore, seen important posts reduced, others imminently endangered, and whole states and large parts of others overrun by small bodies of the enemy—had been destitute of sufficient means of feeding, clothing, paying, and appointing its troops, and had thus exposed them to sufferings for which history scarcely affords a parallel. It had been compelled to make the administration of its affairs a succession of temporary expedients, inconsistent with order, economy, energy, or a scrupulous adherence to public engagements. It found itself, at the close of the war, without any certain means of doing justice to those who had been the principal supporters of the Union: to an army which had bravely fought, and patiently suffered—to citizens and to foreigners, who had cheerfully lent their money—and to others who had contributed property and personal service to the common cause. It was obliged to rely, for the last hope of doing that justice, on the precarious concurrence of thirteen distinct legislatures, the dissent of either of which might defeat the plan and leave the states, at an early period of their existence, involved in all the disgrace and mischiefs of violated faith and national bankruptcy.<sup>1</sup>

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<sup>1</sup> Hamilton's proposed Resolutions; Life, II. 280-287.

While, therefore, the United States emerged from the war, which for seven long years had wasted the energies and drained the resources of the people, with national independence, dark and portentous clouds gathered about the dawn of peace, as the future opened before them. The past had been crowned with victory; dearly bought, but not at too dear a price, for it brought with it the vast boon of civil liberty. But the dangers and embarrassments through which that victory had been achieved made it apparent that the government of the country was unequal to its protection and prosperity. That government was now called to assume the great duties of peace, without the acknowledged power of maintaining either an army or a navy, and without the means of combining and directing the forces and wills of the several parts to a general end; without the least control over commerce; without the power to fulfil a treaty; without laws acting upon individuals; and with no mode of enforcing its own will but by coercing a delinquent state to its federal obligations by force of arms. How it met the great demands upon its energy and durability which its new duties involved will require consideration after the Treaty of Peace and Independence has been described.

## CHAPTER X.

JANUARY, 1784—MAY, 1787.

### DUTIES AND NECESSITIES OF CONGRESS.—REQUISITIONS ON THE STATES.—REVENUE SYSTEM OF 1783.

THE period which now claims our attention is that extending from the Peace of 1783 to the calling of the convention which framed the Constitution in 1787. It was a period full of dangers and difficulties. The destinies of the Union seemed to be left to all the hazards arising from a defective government and the illiberal and contracted policy of its members. Patriotism was generally thought to consist in adhesion to state interests, and a reluctance to intrust power to the organs of the nation. The national obligations were therefore disregarded; treaty stipulations remained unfulfilled; the great duty of justice failed to be discharged; rebellion raised a dangerous and nearly successful front; and the commerce of the country was exposed to the injurious policy of other nations, with no means of counteracting or escaping from its effects. At length the people of the United States began to see danger after they had felt it, and the growth of sounder views and higher principles of public conduct gave to the friends of order, public faith, and national security a controlling influence in the country, and enabled the men, who had won for it the blessings of liberty, to establish for it a durable and sufficient government.

Four years only elapsed between the return of peace and the downfall of a government which had been framed with the hope and promise of perpetual duration—an interval of time no longer than that during which the people of the United States are now accustomed to witness a change of their rulers, without injury to any principle or any form of their institutions. But this brief interval was full of suffering and peril. There are scarcely any evils or dangers of a political nature, and springing from political

and social causes, to which a free people can be exposed, which the people of the United States did not experience during this period. That these evils and dangers did not precipitate the country into civil war, and that the great undertaking of forming a new and constitutional government by delegates of the people could be entered upon and prosecuted with the calmness, conciliation, and concession essential to its success, is owing partly to the fact that the country had scarcely recovered from the exhausting effects of the Revolutionary struggle; but mainly to the existence of a body of statesmen, formed during that struggle, and fitted by hard experience to build up the government. But before their efforts and their influences are explained, the period which developed the necessity for their interposition must be described. He who would know what the Constitution of the United States was designed to accomplish must understand the circumstances out of which it arose.

On the 3d of November, 1783, a new Congress, according to annual custom, was assembled at Annapolis, and attended by only fifteen members, from seven states. Two great acts awaited the attention of this assembly—both of an interesting and important character, both of national concern. The one was the resignation of Washington; a solemnity which appealed to every feeling of national gratitude and pride, and which would seem to have demanded whatever of pomp and dignity and power the United States could display. The other was a legislative act, which was to give peace to the country by the ratification of the treaty. Several weeks passed on, and yet the attendance was not much increased. Washington's resignation was received, at a public audience of seven states, represented by about twenty delegates;'

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<sup>1</sup> The Journals give the following account of Washington's resignation:

"According to order, his excellency the Commander-in-chief was admitted to a public audience, and being seated, the president, after a pause, informed him that the United States in Congress assembled were prepared to receive his communications; whereupon he arose and addressed as follows: 'MR. PRESIDENT,—The great events on which my resignation depended having at length taken place, I have now the honor of offering my sincere congratulations to Congress, and of presenting myself before them to surrender into their hands the trust committed to me, and to claim the indulgence of retiring from the service of my country. Happy in the confirmation of our independence and

and on the same day letters were despatched to the other states, urging them, for the safety, honor, and good faith of the United States, to require the immediate attendance of their mem-

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sovereignty, and pleased with the opportunity afforded the United States of becoming a respectable nation, I resign with satisfaction the appointment I accepted with diffidence; a diffidence in my abilities to accomplish so arduous a task; which, however, was superseded by a confidence in the rectitude of our cause, the support of the supreme power of the Union, and the patronage of Heaven. The successful termination of the war has verified the most sanguine expectations; and my gratitude for the interposition of Providence, and the assistance I have received from my countrymen, increases with every review of the momentous contest. While I repeat my obligations to the army in general, I should do injustice to my own feelings not to acknowledge, in this place, the peculiar services and distinguished merits of the gentlemen who have been attached to my person during the war. It was impossible the choice of confidential officers to compose my family should have been more fortunate. Permit me, sir, to recommend in particular those who have continued in the service to the present moment, as worthy of the favorable notice and patronage of Congress. I consider it an indispensable duty to close this last act of my official life by commending the interests of our dearest country to the protection of Almighty God, and those who have the superintendence of them to his holy keeping. Having now finished the work assigned me, I retire from the great theatre of action, and, bidding an affectionate farewell to this august body under whose orders I have so long acted, I here offer my commission, and take my leave of all the employments of public life.' He then advanced and delivered to the president his commission, with a copy of his address, and having resumed his place, the president (Thomas Mifflin) returned him the following answer: 'SIR,—The United States in Congress assembled receive with emotions too affecting for utterance the solemn resignation of the authorities under which you have led their troops with success through a perilous and doubtful war. Called upon by your country to defend its invaded rights, you accepted the sacred charge before it had formed alliances, and whilst it was without funds or a government to support you. You have conducted the great military contest with wisdom and fortitude, invariably regarding the rights of the civil power through all disasters and changes. You have, by the love and confidence of your fellow-citizens, enabled them to display their martial genius and transmit their fame to posterity. You have persevered till these United States, aided by a magnanimous king and nation, have been enabled, under a just Providence, to close the war in freedom, safety, and independence; on which happy event we sincerely join you in congratulations. Having defended the standard of liberty in this New World, having taught a lesson useful to those who inflict and to those who feel oppression, you retire from the great theatre of action with the blessings of your fellow-citizens; but the glory of your vir-

bers.<sup>1</sup> It was not, however, until the 14th of January that the treaty could be ratified by the constitutional number of nine states; and, when this took place, there were present but three-and-twenty members.<sup>2</sup>

It should undoubtedly be considered that, from the nature and form of the government, the delegates in Congress had in some sense an ambassadorial character, and were assembled as the representatives of sovereign states. But with whatever dignity, real or fictitious, they may be considered as having been clothed, the government itself was one that created a constant tendency to the neglect of its functions, and therefore produced great practical evils. The Articles of Confederation provided that delegates should be annually appointed by the states, to meet in Congress on the first Monday in November in every year; and although they also gave to Congress the power of adjournment for a recess, during which the government was to be devolved on a committee of the states, they fixed no period for the termination of a session. While the war lasted, it had been both customary and necessary for the old Congress, and for its successors under the Confederation, to be perpetually in session; and this practice was continued after the peace, with very short intervals of committees of the states, partly from habit, and partly in consequence of the reduction of the delegations to the lowest constitutional number. This rendered despatch impossible, by putting it in the power of a few members to withhold from important matters the constitutional concurrence of nine states. Without any reference to population by the Articles of Confederation, not less than two nor more than seven delegates were allowed to each state; and

tues will not terminate with your military command; it will continue to animate remotest ages. We feel with you our obligations to the army in general, and will particularly charge ourselves with the interests of those confidential officers who have attended your person to this affecting moment. We join you in commending the interests of our dearest country to the protection of Almighty God, beseeching him to dispose the hearts and minds of its citizens to improve the opportunity afforded them of becoming a happy and respectable nation. And for you we address to him our earnest prayers that a life so beloved may be fostered with all his care; that your days may be happy as they have been illustrious; and that he will finally give you that reward which this world cannot give." Journals, IX. 12, 13. December 22, 1783.

<sup>1</sup> Ibid.

<sup>2</sup> Journals, IX. 30. January 14, 1784.

by casting the burden of maintaining its own delegates upon each state, they created a strong motive for preferring the smaller number, and often for not being represented at all. This motive became more active after the peace, when the immediate stimulus of hostilities was withdrawn; and it was at the same time accompanied, in most of the states, by a great jealousy of the powers of Congress, a disinclination to enlarge them, and a prevalent feeling that each state was sufficient unto itself for all the purposes of government.<sup>1</sup> The consequence was, that the Congress of the Confederation, from the ratification of the Treaty of Peace to the adoption of the Constitution, although entitled to ninety-one members, was seldom attended by one third of that number; and the state of the representation was sometimes so low that one eighth<sup>2</sup> of the whole number present could, under the constitutional rule, negative the most important measures.<sup>3</sup>

<sup>1</sup> See Washington's letter to Governor Harrison, of the date of January 18, 1784. Writings, IX. 11.

<sup>2</sup> Twenty-three members voted on the ratification of the treaty, January 14, 1784. On the 19th of April of the same year, the same number being present, eleven states only being represented, and nine of these having only two members each, the following resolution was passed: "*Resolved*, That the legislatures of the several states be informed that, while they are respectively represented in Congress by two delegates only, such a unanimity for conducting the most important public concerns is necessary as can rarely be expected; that if each of the thirteen states should be represented by two members, five out of twenty-six, being only a fifth of the whole, may negative any measures requiring the voice of nine states; that of eleven states now on the floor of Congress, nine being represented by only two members from each, it is in the power of three out of twenty-five, making only one eighth of the whole, to negative such a measure, notwithstanding that by the Articles of Confederation the dissent of five out of thirteen, being more than one third of the number, is necessary for such a negative; that in a representation of three members from each state, not less than ten of thirty-nine could so negative a matter requiring the voice of nine states; that, from facts under the observation of Congress, they are clearly convinced that a representation of two members from the several states is extremely injurious by producing delays, and for this reason is likewise much more expensive than a general representation of three members from each state; that therefore Congress conceive it to be indispensably necessary, and earnestly recommend, that each state, at all times when Congress are sitting, be hereafter represented by three members at least; as the most injurious consequences may be expected from the want of such representation." At the time when the report of the Convention, transmitting the Constitution, was received (September



Such was the government which was now called to provide for the payment of at least the interest on the public debts, and to procure the means for its own support; to carry out the Treaty of Peace, and secure to the country its advantages; to complete the cessions of the western lands, and provide for their settlement and government; to guard the commerce of the country against the hostile policy of other nations; to secure to each state the forms and principles of a republican government; to extend and secure the relations of the country with foreign powers; and to preserve and perpetuate the Union. By tracing the history of its efforts and its failures with regard to these great objects, we may understand the principal causes which brought about the conviction on the part of the people of the United States that another and a stronger government must take the place of the Confederation.

It was ascertained in April, 1784, that a sum exceeding three millions of dollars would be wanted to pay the arrears of interest and to meet the interest and current expenses of the public service for the year.<sup>1</sup> Two sources only could be looked to for this supply. It must either be obtained by requisitions on the states, according to the old rule of the Confederation, or from the new duties and taxes proposed by the revenue system of 1783. But that proposal was still under the consideration of the state legislatures, some of them having as yet acceded to the impost only, and others having decided neither on the impost nor on the supplementary taxes. Some time must therefore elapse before the final confirmation of this system, even if its final confirmation were probable; and, after it should have been confirmed, further time would be requisite to bring it into operation. It was quite clear, therefore, that other measures must be resorted to. Requisitions presented the sole resource. But in what mode were they to be made? The preceding Congress had offered two recommendations to the states on the subject of the rule of the Confederation, which directed that the quotas of the several states should be apportioned according to the value of their lands. The Con-

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28, 1787), there were thirty-three members in attendance, from twelve states. Rhode Island was not represented.

<sup>1</sup> The sum reported by a committee, and finally agreed to be necessary, was \$3,812,539.33. Journals, IX. 171. April 27, 1784.

gress of 1783, in order to give this rule a fair trial, had recommended to the states to make returns of their lands, buildings, and inhabitants;<sup>1</sup> but, apprehending that the insufficiency of the rule would immediately show itself, they had followed this recommendation with another, to change the basis of contribution from land to numbers of inhabitants.<sup>2</sup> Both of these propositions were still under the consideration of the state legislatures, and four states only had acceded to them.<sup>3</sup> A new requisition, therefore, if made at all, must be made under the old rule of the Confederation, and with entirely imperfect means of making it with justice and equality. It was found, however, that large arrears of the old requisitions made during the war were still due from the states.<sup>4</sup> A new call upon them to pay one half of these arrears, deducting therefrom the amount of their payments to the close of the year, would, if complied with, produce a sum nearly sufficient for the wants of the government. This resource was accordingly tried.<sup>5</sup>

In the year 1785 three millions, it was ascertained, would be required for the service of the year. A renewed call was made for the remaining unpaid moiety of the old requisition of eight millions, and for the whole of the old requisition of two millions; but, considering that the public faith required Congress to continue their annual demand for money, they issued a new requisition for three millions, and adjusted it according to the best information they could obtain.<sup>6</sup>

In the year 1786 a sum of more than three millions was wanted for the current demands on the treasury, and a new requisition was made for it, under the old rule of the Confederation.<sup>7</sup> Two of the states, Rhode Island and New Jersey, thereupon passed acts making their own paper currency receivable on all arrears of taxes due to the United States, and proposing to pay their quotas in such currency.<sup>8</sup>

<sup>1</sup> Journals, VIII. 129. February 17, 1783.   <sup>2</sup> Ibid., 198. April 26, 1783.

<sup>3</sup> Connecticut, New Jersey, Pennsylvania, and South Carolina.

<sup>4</sup> Of the old requisition of \$8,000,000, made October 30, 1781, only \$1,486,511.71 had been paid by all the states before December 31, 1783.

<sup>5</sup> Journals, IX. 171-179. April 27, 1784.

<sup>6</sup> Journals, X. 325-334. September 27, 1785.

<sup>7</sup> Journals, XI. 167. August 2, 1786.

<sup>8</sup> Journals, XI. 224. September 18, 1786. Upon this attempt of Rhode Island

But the entire inadequacy of this source of supply to maintain the federal government and to discharge the annual public engagements had now become but too apparent. From the 1st of November, 1781, to the 1st of January, 1786, less than two and a half millions of dollars had been received from requisitions made during that period, amounting to more than ten millions.<sup>1</sup> For the last fourteen months of that interval the average receipts from requisitions amounted to less than four hundred thousand dollars per annum, while the interest alone due on the foreign debt was more than half a million; and, in the course of each of the nine following years, the average sum of one million annually would become due by instalments on the principal of that debt.<sup>2</sup> In addition to this, the interest on the domestic debt; the security of the navigation and commerce of the country against the Barbary powers; the immediate protection of the people dwelling on the frontier from the savages; the establishment of military magazines in different parts of the Union, quite indispensable to the public safety; the maintenance of the federal government at home, and the support of the public servants abroad—each and all depended upon the contribution of the states under the annual requisitions, and were each and all likely to be involved in a common failure and ruin.<sup>3</sup>

There can be no doubt that the continuance of the practice of making requisitions, after the proposal of the revenue system of

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and New Jersey to pay their proportions in their own paper currency the report of a committee declared, "That to admit the receipt of bills of credit, issued under the authority of an individual state, in discharge of their specie proportions of a requisition, would defeat its object, as the said bills do not circulate out of the limits of the state in which they are emitted, and because a paper medium of any state, however well funded, cannot, either in the extensiveness of its circulation or in the course of its exchange, be equally valuable with gold and silver. That if the bills of credit of the states of Rhode Island and New Jersey were to be received from those states in discharge of federal taxes, upon the principles of equal justice, bills emitted by any other states must be received by them also in payment of their proportions, and thereby, instead of the requisitions yielding a sum in actual money, nothing but paper would be brought into the federal treasury, which would be wholly inapplicable to the payment of any part of the interest or principal of the foreign debt, or the maintenance of the government of the United States."

<sup>1</sup> Journals, XI. 34-40. February 15, 1786.

<sup>2</sup> Ibid.

<sup>3</sup> Ibid.

1783, had some tendency to prevent the adoption of that system by the states. But there was no other alternative within the constitutional reach of Congress; and in the meantime the revenue system, submitted as it necessarily was to the legislatures of thirteen different states, was, as far as it was assented to, embarrassed with the most discordant and irreconcilable provisions. It was ascertained in February, 1786, that seven of the states had granted the impost part of the system in such a manner that, if the other six states had made similar grants, the plan of the general impost might have been immediately put into operation.<sup>1</sup> Two of the other states had also granted the impost, but had embarrassed their grants with provisos which suspended their operation until all the other states should have passed laws in full conformity with the whole system.<sup>2</sup> Two other states had fully acceded to the system in all its parts;<sup>3</sup> but four others had not decided in favor of any part of it.<sup>4</sup>

No member of the Confederacy had, at this time, suggested to Congress any reasonable objection to the principles of the system, and the contradictory provisions by which their assent to it had been clogged present a striking proof of the inherent difficulties of obtaining any important constitutional change from the legislatures of the states. The government was founded upon a principle by which all its powers were derived from the states in their corporate capacities; in other words, it was a government created by, and deriving its authority from, the governments of the states. They alone could change the fundamental law of its organization; and they were actuated by such motives and jealousies as rendered a unanimous assent to any change a great improbability. Still, the Congress of 1786 hoped that, by a clear and explicit declaration of the true position of the country, the requisite compliance of the states might be obtained. They accordingly made known, in the most solemn manner, the public embarrassments, and declared that the crisis had arrived when the people of the United States must decide whether they were to continue to rank as a

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<sup>1</sup> New Hampshire, Massachusetts, Connecticut, New Jersey, Virginia, North Carolina, and South Carolina.

<sup>2</sup> Pennsylvania and Delaware.

<sup>3</sup> Delaware and North Carolina.

<sup>4</sup> Rhode Island, New York, Maryland, and Georgia.

nation by maintaining the public faith at home and abroad, or whether, for want of timely exertion in establishing a general revenue, they would hazard the existence of the Union and the great national privileges which they had fought to obtain.<sup>1</sup>

Under the influence of this urgent representation all the states, except New York, passed acts granting the impost, and vesting the power to collect it in Congress, pursuant to the recommendations of 1783, but upon the condition that it should not be in force until all the states had granted it in the same manner. The state of New York passed an act<sup>2</sup> reserving to itself the sole power of levying and collecting the impost; making the collectors amenable to and removable by the state, and not by Congress; and making the duties receivable in specie or bills of credit, at the option of the importer. Such a departure from the plan suggested by Congress and adopted by the other states, of course, made the whole system inoperative in the other states, and there remained no possibility of procuring its adoption but by inducing the state of New York to reconsider its determination. All hope of meeting the public engagements and of carrying on the government now turned upon the action of a single state.

The principal argument made use of by those who supported the conduct of New York was that Congress, being a single body, might misapply the money arising from the duties. An answer to this pretence, from the pen of Hamilton, declared that the interests and liberties of the people were not less safe in the hands of those whom they had delegated to represent them for one year in

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<sup>1</sup> The report on this occasion (February 15, 1786), drawn by Rufus King, declared "that the requisitions of Congress for eight years past have been so irregular in their operation, so uncertain in their collection, and so evidently unproductive, that a reliance on them in future as a source from whence money is to be drawn to discharge the engagements of the Confederacy, definite as they are in time and amount, would be not less dishonorable to the understandings of those who entertain such confidence than it would be dangerous to the welfare and peace of the Union. The committee are therefore seriously impressed with the indispensable obligation that Congress are under of representing to the immediate and impartial consideration of the several states the utter impossibility of maintaining and preserving the faith of the federal government by temporary requisitions on the states, and the consequent necessity of an early and complete accession of all the states to the revenue system of the 18th of April, 1783."

<sup>2</sup> May 4, 1786.

Congress than they were in the hands of those whom they had delegated to represent them for one or four years in the legislature of the state; that all government implies trust, and that every government must be trusted so far as it is necessary to enable it to attain the ends for which it is instituted, without which insult and oppression from abroad and confusion and convulsion at home must ensue.<sup>1</sup> The real motive, however, with those who ruled the counsels of New York at this period, was a hope of the commercial aggrandizement of the state; and the jealousies and fears of national power, which were widely prevalent, were diligently employed to defeat the system proposed by Congress.

After the passage of the act of New York, and the adjournment of the legislature, Congress earnestly recommended to the executive of that state to convene the legislature again, to take into its consideration the recommendation of the revenue system, for the purpose of granting the impost to the United States, in conformity with the grants of other states, so as to enable the United States to carry it into immediate effect.<sup>2</sup> The governor declined to accede to this recommendation.<sup>3</sup> Congress repeated it, declaring that the critical and embarrassed state of the finances required that the impost should be carried into immediate operation, that the occasion was sufficiently important and extraordinary for them to request that the legislature should be specially convened.<sup>4</sup> The executive of New York again refused the request of Congress, and the fate of the impost system remained suspended until the meeting of the legislature, at its regular session in January, 1787. It was never adopted by that state, and consequently never took effect.

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<sup>1</sup> Life of Hamilton, II. 385.

<sup>2</sup> August 11, 1786.

<sup>3</sup> The ground of his refusal was, "that he had not the power to convene the legislature before the time fixed by law for their stated meeting, except upon '*extraordinary occasions*,' and as the present business had already been particularly laid before them, and so recently as at their last session received their determination, it cannot come within that description." Life of Hamilton, II. 389.

<sup>4</sup> August 23, 1786.

## CHAPTER XI.

1784-1787.

### INFRACTIONS OF THE TREATY OF PEACE.

THE Treaty of Peace, ratified on the 14th of January, 1784, contained provisions of great practical and immediate importance. One of its chief objects, on the part of the United States, was, of course, to effect the immediate withdrawal of the British troops, and of every sign of British authority, from the country whose independence it acknowledged. A stipulation was accordingly introduced, by which the king bound himself, with all convenient speed, and without causing any destruction, or carrying away any negroes or other property of the American inhabitants, to withdraw all his armies, garrisons, and fleets from the United States, and from every post, place, and harbor within the same. Although the ratification of the treaty was followed by the departure of the British forces from the Atlantic coast, many important posts in the Western country, within the incontestable limits of the United States, with a considerable territory around each of them, were still retained.<sup>1</sup>

On the part of England, it was of great consequence to secure to British subjects the property and rights of property of the enjoyment of which the state of hostilities had deprived them. A war between colonies and the parent state, which had sundered the closest intimacies of social and commercial intercourse, involved of necessity vast private interests. There were two large classes of English creditors whose interests required protection: the British merchants to whom debts had been contracted before the Revolution, and the Tories, who had been obliged to depart from the United States, leaving debts due to them, and landed property, which had been seized. Clear and explicit stipulations were inserted in the

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<sup>1</sup> Secret Journals of Congress, IV. 186, 187.

treaty, in order to protect these interests. It was provided that creditors on either side should meet with no lawful impediments to the recovery of the full value in sterling money of all *bona fide* debts contracted before the date of the treaty.<sup>1</sup> It was also agreed that Congress should earnestly recommend to the legislatures of the respective states to provide for the restitution of all estates, rights, and properties which had been confiscated, belonging to real British subjects, and to persons resident in districts in the possession of his majesty's arms, and who had not borne arms against the United States; that persons of any other description should have free liberty to go into any of the states, and remain for the period of twelve months unmolested in their endeavors to obtain the restitution of their property and rights which had been confiscated; that Congress should recommend to the states a reconsideration and revision of all their confiscation laws, and a restoration of the rights and property of the last-mentioned persons, on their refunding the *bona fide* price which any purchaser might have given for them since the confiscation. It was also agreed that all persons having any interest in confiscated lands, either by debts, marriage settlements, or otherwise, should meet with no lawful impediment in the prosecution of their just rights.<sup>2</sup>

It was further provided that there should be no future confiscations made, nor any prosecutions commenced against any person on account of the part he might have taken in the war, and that no person should, on that account, suffer any future loss or damage, either in person, liberty, or property, and that those who might be in confinement on such charges, at the time of the ratification of the treaty in America, should be immediately set at liberty, and the prosecutions be discontinued.<sup>3</sup>

These provisions related to a great subject, with which, in the existing political system of this country, it was difficult to deal. The action of the states with regard to some of the interests involved in these stipulations had been irregular from an early period of the war. The Revolutionary Congress, on the commencement of hostilities, had suffered the opportunity of asserting their rightful control over the subject of alien interests, except as to property found on the high seas, to pass away; and

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<sup>1</sup> Article IV.

<sup>2</sup> Article V.

<sup>3</sup> Article VI.



the consequence was, that the states had, on some points, usurped an authority which belonged to the Union. A union founded in compact, and vesting the rights of war and peace in Congress, was formed in 1775; and from that time the Colonies, or, as they afterwards became, states, were never rightfully capable of passing laws to sequester or confiscate the debts or property of a national enemy.<sup>1</sup> After the great acts of national sovereignty which took place in 1775-6, a British subject could not, with any propriety, be considered as the enemy of Massachusetts or of Virginia; he was the enemy of the United States, and by that authority alone, as the belligerent, was his property, in strictness, liable to be seized, or the debts due to him sequestered. But neither the Revolutionary Congress, nor that of the Confederation, appear to have ever exercised the power of confiscating the debts or property of British subjects, within the states, or to have recommended such confiscation to the states themselves.<sup>2</sup> On the other hand, they did not interfere when the states saw fit to do it.

With regard to those inhabitants of the states who, adhering to the British crown, had abandoned the country and left property behind them, it cannot so clearly be affirmed that the states should not have dealt with their persons or property. Congress, as we have seen, at an early period of the war, committed the whole subject of restraining the persons of the Tories to the colonies or states; and as Congress never assumed or exercised any jurisdiction over their property, it was of course left to be dealt with by the legislatures of the states, to whom Congress had declared that their several inhabitants owed allegiance.<sup>3</sup> But as these persons, by adhering to the crown, might claim of the crown the rights and protection of British subjects, the propriety of confiscating or withholding their property would remain for solution, at the negotiation of the Treaty of Peace, as a question of general justice and equity, rather than of public law.

The interests of both of these classes of persons were too important to be overlooked. Three millions sterling were due from

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<sup>1</sup> See the report made to Congress on this subject by Mr. Jay, Secretary of Foreign Affairs, October, 1786. *Secret Journals*, IV. 209.

<sup>2</sup> *Ibid.*

<sup>3</sup> Resolve of June 24, 1776. *Journals*, II. 216. *Ante*, p. 36, note.

the inhabitants of the colonies to merchants in Great Britain, at the commencement of the war. At the return of peace the laws of five of the states were found either to prohibit the recovery of the principal, or to suspend its collection, or to prohibit the recovery of interest, or to make land a good payment in place of money.<sup>1</sup> The purpose of the treaty was to declare that all *bona fide* debts, contracted before the date of the treaty, and due to citizens of either country, remained unextinguished by the war; and, consequently, that interest, when agreed to be paid, or payable by the custom, or demandable as damages for delay of payment, was justly due. Over this whole subject of foreign debts the national sovereignty, of right, had exclusive control; for confiscation of the property of a national enemy belongs exclusively to the power exercising the rights of war; and therefore whatever state laws might have been passed during the war, exercising rights which belonged to the national sovereign, they could have no validity when that sovereign came to resume its control over the subject, and to stipulate that the right of confiscation, if it ever existed, should not be exercised. The state laws, however, existed, and remained in conflict with the treaty for several years, producing consequences to which I shall presently advert.

The fifth article of the treaty was infringed by an act passed by the state of New York, authorizing actions for rent to be brought by persons who had been compelled to leave their lands and houses by the enemy, against those who had occupied them while the enemy were in possession, and declaring that no military order or command of the enemy should be pleaded in justification of such occupation.<sup>2</sup>

The sixth article was also violated by an act of the same state, which made those inhabitants who had adhered to the enemy, if

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<sup>1</sup> An act passed by the legislature of Massachusetts, November 9, 1784, suspended judgment for interest on British debts, until Congress should have put a construction upon the treaty declaring that it was due. An act of the state of New York, of July 12, 1782, restrained the collection of debts due to persons within the enemy's lines. Pennsylvania, soon after the peace, passed a law restraining the levy of executions. Virginia, at the time of the peace, had existing laws inhibiting the recovery of British debts. South Carolina had made land a good payment, in place of money. See Mr. Jay's Report.

<sup>2</sup> Passed March 17, 1783. Secret Journals, IV. 267.

found within the state, guilty of misprision of treason, and rendered them incapable of holding office, or of voting at elections.<sup>1</sup>

The powers of the government were entirely inadequate to meet this state of things. The Confederation gave to the United States in Congress assembled the sole and exclusive right of determining on peace and war, and of entering into treaties and alliances. The nature of the sovereignty thus established made a treaty the law of the land, and binding upon every member of the Union; but there existed no means of enforcing the obligation. If the legislatures of the states passed laws restraining or interfering with the provisions of a treaty, Congress could only declare that they ought to be, and recommend that they should be, repealed. The simple and effectual intervention of a national judiciary, clothed with the power of declaring void any state legislation that conflicted with the national sovereignty, and of giving the means of enforcing all rights which that sovereignty had guaranteed by compact with a foreign power, did not exist. Resort, it is true, could be had to the state tribunals; and, on one memorable occasion, such resort was had to them with success. But the legislative power assailed the independence of the judiciary, and indignantly declared a decision, made with fairness by a competent tribunal, subversive of law and good order, because it recognized the paramount authority of a treaty over a statute of the state.

The effect of such state legislation upon the relations of the two countries was direct and mischievous. The Treaty of Peace was designed, and was adapted, to produce a fair and speedy adjustment of those relations, upon principles of equity and justice.

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<sup>1</sup> Passed May 12, 1784, after the treaty had been ratified. Secret Journals, IV. 269-274.

<sup>2</sup> This happened in New York, in a case under the "Trespass Act," where a suit was brought in the Mayor's Court of the city of New York, "to recover the rents of property held by the defendant under an order of Sir Henry Clinton. Hamilton, in the defence of this case, contended, with great power, that the act was a violation of the treaty, and the court sustained his position. But the legislature passed resolves, declaring the decision to be subversive of law and good order, and recommending the appointing power "to appoint such persons mayor and recorder of New York as will govern themselves by the known law of the land." *Life of Hamilton*, II. 244, 245.

But its obligations were reciprocal, and it could not execute itself. It was made, on the one side, by a power capable of performing, but also capable of waiting for the performance of the obligations which rested upon the other contracting party. On the other side, it was made by a power possessed of very imperfect means of performance, yet standing in constant need of the benefit which a full compliance with its obligations would insure. After the lapse of three years from the signature of the preliminary articles, and of more than two years from that of the definitive treaty, the military posts in the western country were still held by British garrisons, avowedly on account of the infractions of the treaty on our part. The minister of the United States at St. James's was told, in answer to his complaints, that one party could not be obliged to a strict observance of the engagements of a treaty, and the other remain free to deviate from its obligations; and that whenever the United States should manifest a real determination to fulfil their part of the treaty, Great Britain would be ready to carry every article of it into complete effect.<sup>1</sup> An investigation of the whole subject, therefore, became necessary, and Congress directed the Secretary of Foreign Affairs to make inquiry into the precise state of things. His report ascertained that the fourth and fifth articles of the treaty had been constantly violated on our part by legislative acts still in existence and operation; that on the part of England, the seventh article had been violated, by her continuing to hold the posts from which she had agreed to withdraw her garrisons, and by carrying away a considerable body of negroes, the property of American inhabitants, at the time of the evacuation of New York.<sup>2</sup>

The serious question recurred—what was to be done? The United States had neither committed nor approved of any violation of the treaty; but an appeal was made to their justice, relative to the conduct of particular states, for which they were obliged eventually to answer. They could only resolve and recommend; and accordingly, after having declared that the legislatures of the

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<sup>1</sup> Mr. John Adams was sent as the first minister of the United States to the Court of St. James in 1785. He received this reply to a memorial which he addressed to the British government, on the subject of the western posts, in February, 1786. *Secret Journals*, IV. 187.

<sup>2</sup> *Secret Journals*, IV. 209.

states could not, of right, do anything to explain, interpret, or limit the operation of a treaty, Congress recommended to the states to pass a general law, repealing all their former acts that might be repugnant to the treaty, and leaving to their courts of justice to decide causes that might arise under it, according to its true intent and meaning, by determining what acts contravened its provisions.<sup>1</sup> This recommendation manifestly left the interests of the Union exposed to two hazards: the one, that the legislatures of the states might not pass the repealing statute, which would submit the proper questions to their courts, and the other, that their courts might not decide with firmness and impartiality between the policy of the state, on the one hand, and the interests of foreigners and obnoxious Tories, on the other.

But this was all that could be done, and partial success only followed the effort. Most of the states passed acts, in compliance with the recommendation of Congress, to repeal their laws which prevented the recovery of British debts.<sup>2</sup> But the state of Virginia, although it passed such an act, suspended its operation until the governor of the state should issue a proclamation, giving notice that Great Britain had delivered up the western posts, and was taking measures for the further fulfilment of the treaty, by delivering up the negroes belonging to the citizens of that state, which had been carried away, or by making compensation for their value.<sup>3</sup> The two countries were thus brought to a stand in their efforts to adjust the matters in dispute, and the western posts remained in the occupation of British garrisons, inflaming the hostile temper of the Indian tribes, and enhancing the difficulty of settling the vacant lands in the fertile region of the Great Lakes.<sup>4</sup>

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<sup>1</sup> March 21, 1787.

<sup>2</sup> New Hampshire, Massachusetts, Rhode Island, Connecticut, Delaware, Maryland, Virginia, and North Carolina passed such acts.

<sup>3</sup> Pitkin's History of the United States, II. 198.

<sup>4</sup> Marshall's Life of Washington, V. 67, 68.

## CHAPTER XII.

1786-1787.

NO SECURITY AFFORDED BY THE CONFEDERATION TO THE STATE GOVERNMENTS.—SHAYS'S REBELLION IN MASSACHUSETTS, AND ITS KINDRED DISTURBANCES.

No federative government can be of great permanent value which is not so constructed that it may stand, in some measure, as the common sovereign of its members, able to protect them against internal disorders, as well as against external assaults. The Confederation undertook but one of these great duties. It was formed at a time when the war with England was the great object of concern to the revolted colonies, and when they felt only the exigencies which that war created. Hence its most important powers, as well as its leading purpose, concerned the common cause of resistance to a foreign domination. A federal league of states independent of each other, formed principally for mutual defence against a common enemy, was all that succeeded to the general superintending power of the British crown, by which the internal affairs of each of them had always been regulated and controlled, in the last resort. When the tie was broken by which they had been held to the parent state, each of them created for itself a new government, resting for its basis on the popular will, and deriving its authority directly from the people; but none of them provided for the creation of a power, external to itself, which might stand as the guarantor and protector of their new institutions, and secure the principles on which they rested against violence and overthrow. Yet the constitutions thus formed, from their peculiar nature, eminently needed the safeguards which such a power could afford.

These constitutions were admirably constructed. They contained principles imperfectly known to the ancient governments; found in modern times only in the government of England; and

applied there with far less consistency and completeness. They embraced the regular distribution of political power into distinct departments; legislative checks and balances, by means of two co-ordinate branches of the legislature; a judiciary in general holding office during good behavior; and the representation of the people in the legislature, by deputies of their own actual election, in which the theory of such representation was more perfectly carried into practice than it had ever been in the country from which it was derived. But the fundamental principle on which they all rested, and without which they could not maintain existence, required means of defence. They were established upon the great doctrine that it is the right of every political society to govern itself, and for the purposes of such self-government to create such constitutions and ordain such fundamental laws as its own judgment and its own intelligent choice may find best suited to its own interests. But society can act only by an expression of the aggregate will of its members; and as there may be members who dissent from the views and determinations of the great mass of society, and it is therefore necessary to decide with whom the power of compelling obedience resides—since there must be obedience in order that there may be peace—nature and reason have determined that this power is to reside with a majority of the members. The American constitutions, therefore, are founded wholly upon the principle that a majority expresses the will of the whole society, and may establish, change, and abrogate forms of government at its pleasure.<sup>1</sup> It follows, as a necessary deduction from this fundamental doctrine, that so soon as society has acted in the formation and establishment of a government, upon

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<sup>1</sup> Gibbon, with that graceful satire which knew how to hit two objects with the same stroke of his pen, describes hereditary monarchy as “an expedient which deprives the multitude of the dangerous, and indeed the ideal, power of giving themselves a master.” The historian of the Decline and Fall began to publish his great work just as the American Revolution burst upon the world. Since that sentence was penned, the experiment of a system by which the multitude give to themselves a master, in the constitutional organs of their own will, has had a fair trial. We may not say that its trial is past, or that the system is established beyond the possibility of further dangers. But we may with a just pride point to its escape, in the days of its first establishment and greatest danger, and to the securities which the Constitution of the United States now affords against similar perils when they threaten the constitutions of the states.

this principle, no change can take place but by a new expression of the will of society through the voice of a majority; and whether a majority desires or has actually decreed a change, is a fact that must be made certain, and can only be made certain in one of two modes, either by the evidence and through the channels which the society has previously ordained for this purpose, or by the submission of all its members to a violent and successful revolution.

The first constitution of Massachusetts did not designate any mode in which it was to be amended or changed. But no peaceable change can take place in any government founded on the expressed will of a majority of the people, consistently with the principle on which it had been established, until it has been ascertained, in some mode, that a change is demanded by the same authority. The vital importance of ascertaining this fact with precision was not so clearly perceived at that early period as it is now.

Seizing upon the newly established doctrine, which made them the sources of all political power, the people did not at once apprehend the rule which preserves and upholds that power, and makes the doctrine itself both practicable and safe. Hence, when troubles arose, individuals were led to suppose that they had only to declare a grievance, to demand a change, and to compel a compliance with their demand by force. So far as they reasoned at all, they persuaded themselves that, as their government was the creation of the people, by their own direct act, bodies of the people could assemble in their primary capacity, and, by obstructing any of its functions which they connected with a particular grievance, produce a reform, which the people have always a right to make. By overlooking, in this manner, the only safe and legitimate mode in which the popular will can be really ascertained, they passed into the mischiefs of anarchy and rebellion, mistaking the voices of a minority for the ascertained will of society.

To these tendencies the recently established governments of New England, where the spirit of liberty was most vigorous, could oppose no efficient check; while, in any open outbreak, they were without any external defender on whose power they could lean. The Confederation succeeded to the Revolutionary Congress, as we have more than once had occasion to observe, with less power



than its predecessor might have exercised. It was formed by a written constitution, yet it was, strictly speaking, scarcely a government. It was a close union of the states; but it was a union from which all powers had been jealously withheld which would have enabled it to interfere with vigor and success between an insurgent minority of the people of a state and its lawful rulers. The Revolutionary Congress was once possessed of such large, indefinite powers, that, upon principles of public necessity, it might have assumed, in a great emergency, to hold a direct relation to the internal concerns of any colony. It was, in fact, looked to, in some degree, for direction in the formation of the state governments, after it had broken the bonds of colonial allegiance to the English crown; and it might very properly have undertaken to support the governments whose establishment it had recommended. But such a relation between the early states and the continental power, though it certainly existed in 1776, was soon lost in the independent and jealous attitude which they began to occupy, and the Union rapidly assumed a position where the character of sovereignty which it appeared to wear when it promulgated the Declaration of Independence was scarcely to be discerned. At no period in the history of the Confederation did it act upon the internal concerns or condition of a state. Its written articles of union hardly admitted of a construction which would have enabled it to do so, and certainly contained no express delegation of such a power.

At the same time, some of the state governments, during the period of which we are treating, were singularly exposed to the dangers of anarchy. None of them had any standing forces of any consequence, three years after the peace, and the New England States had no military forces whatever but their militia. No state could call upon its neighbors for aid in quelling an insurrection, for their militia would not have obeyed the summons, if it had been issued; and no state could call upon the federal government, in such an emergency, with any certainty of success in the application.<sup>1</sup>

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<sup>1</sup> A power to interfere in the internal concerns of a state could only have been exercised by a broad construction of the third of the Articles of Confederation, which was in these words: "The said states hereby severally enter into

In such a state of things, the year 1786 witnessed an insurrection in Massachusetts of a very dangerous character, which, from the fortunate circumstance that her counsels were then guided by a man of singular energy and firmness of character, she was just able to subdue. The remote causes of this insurrection lie too far from the path of our main subject to be more than summarily stated.

At the close of the Revolutionary war the state of Massachusetts was oppressed with an enormous debt. At the breaking out of that war the debt of the colony was less than one hundred thousand pounds. The private debt of the state, in the year 1786, was one million three hundred thousand pounds, besides two hundred and fifty thousand pounds due to the officers and soldiers of the state line of the Revolutionary army. The state's proportion of the federal debt was not less than one million and a half of pounds.<sup>1</sup> According to the customary mode of taxation, one third of the whole debt was to be paid by the ratable polls, which scarcely exceeded ninety thousand.<sup>2</sup> The Revolution had made the people of Massachusetts familiar with the great general doctrines of liberty and human rights; but it had

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a firm league of friendship with each other, for their common defence, the security of their liberties, and their mutual and general welfare; binding themselves to assist each other against all force offered to or attacks made upon them, or any of them, on account of religion, sovereignty, trade, or any other pretence whatever." When this is compared with the clear and explicit provision in the Constitution, by which it is declared that "the United States shall guarantee to every state in this Union a republican form of government," there can be no wonder that a doubt was felt in the Congress of 1786-87 as to their powers upon this subject. It is true that the Massachusetts delegation, when they laid before Congress the measures which had been taken by the state government to suppress the insurrection, expressed the confidence of the legislature that the firmest support and most effectual aid would have been afforded by the United States, had it been necessary, and asserted that such support and aid were expressly and solemnly stipulated by the Articles of Confederation (Journals, XII. 20. March 9, 1787). But this was clearly not the case; and it was not generally supposed in Congress that the power existed by implication. All that was done by Congress towards raising troops, at the time of the insurrection, was done for the *ostensible* purpose of protecting the frontiers against an Indian invasion, as we shall see hereafter.

<sup>1</sup> Minot's History of the Insurrection, p. 6.

<sup>2</sup> Ibid.

given them little insight into the principles of revenue and finance, and little acquaintance with the rules of public economy. No sufficient means, therefore, to relieve the people from direct taxation, by encouraging a revival of trade and at the same time drawing from it a revenue, were devised by the legislature. The exports of the state, moreover, had suffered a fearful diminution. The fisheries, which had been a fruitful source of prosperity to the colony, had been nearly destroyed by the war, and the markets of the West Indies and of Europe were now closed to the products of this lucrative industry, by which wealth had formerly been drawn from the wastes of the ocean. The state had scarcely any other commodity to exchange for the precious metals in foreign commerce. Its agriculture yielded only a scanty support to its population, if it yielded so much; its manufactures were in a languishing condition; and its carrying trade had been driven from the seas during the war, and was afterwards annihilated by the oppressive policy of England which succeeded the peace. The people were every year growing poorer than they had been the year before, and taxes, onerous taxes, beyond their resources and always odious, were pressing upon them with a constantly increasing accumulation, from which the political state of the country seemed to promise no relief.<sup>1</sup>

But the demand of the tax-gatherer was not the sole burden which individuals had to encounter. Private debts had accumulated during the war, in almost as large a ratio as the public obligations. The collection of such debts had been generally suspended while the struggle for political freedom was going on; but that struggle being over, creditors necessarily became active, and were often obliged to be severe. Suits were multiplied in the courts of law beyond all former precedent, and the first effect of this sudden influx of litigation was to bring popular odium upon the whole machinery of justice. In a state of society approaching so nearly to a pure democracy, the class of debtors, if numerous, must be politically formidable. They had begun to be so before the close of the war. Their clamors and the supposed necessity of the case led the legislature, in 1782, to a violation of

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<sup>1</sup> See the next chapter for some particulars respecting the trade of Massachusetts.

principle, in a law known as the Tender Act, by which executions for debt might be satisfied by certain articles of property, to be taken at an appraisement. This law was limited in its operation to one year; but in the course of that year it taught the debtors their strength, and gave the first signal for an attack upon property. A levelling, licentious spirit, a restless desire for change, and a disposition to throw down the barriers of private rights, at length broke forth in conventions, which first voted themselves to be the people, and then declared their proceedings to be constitutional. At these assemblies the doctrine was publicly broached that property ought to be common, because all had aided in saving it from confiscation by the power of England. Taxes were voted to be unnecessary burdens, the courts of justice to be intolerable grievances, and the legal profession a nuisance. A revision of the constitution was demanded, in order to abolish the Senate, reform the representation in the House, and make all the civil officers of the government eligible by the people.

A passive declaration of their grievances did not, however, content the disaffected citizens of Massachusetts. They proceeded to enforce their demands. The courts of justice were the nearest objects for attack, as well as the most immediately connected with the chief objects of their complaints. Armed mobs surrounded the court-houses in several counties, and sometimes effectually obstructed the sessions of the courts. These acts were repeated, until, in the autumn of 1786, the insurrection broke out in a formidable manner in the western part of the state. The insurgents actually embodied, and in arms against the government, in the month of December, in the counties of Worcester and Hampshire, numbered about fifteen hundred men, and were headed by one Daniel Shays, who had been a captain in the Continental army.<sup>1</sup>

The executive chair of the state was at that time filled by James Bowdoin, a statesman, firm, prudent, of high principle, and devoted to the cause of constitutional order. In the first stages of the disaffection, he had been thwarted by a House of Representatives in which the majority were strongly inclined to sympathize with the general spirit of the insurgents; but the

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<sup>1</sup> Minot's History of the Insurrection, p. 82 et seq.

Senate had supported him. Afterwards, when the movement grew more dangerous, the legislature became more reconciled to the use of vigorous means to vindicate the authority of the government, and a short time before it actually took the form of an armed and organized rebellion against the commonwealth, they had encouraged the governor to use the powers vested in him by the constitution to enforce obedience to the laws. The executive promptly met the emergency. A body of militia was marched against the insurgents, and by the middle of February they were dispersed or captured, with but little loss of life.

The actual resources of the state, however, to meet an emergency of this kind, were feeble and few. A voluntary loan, from a few public-spirited individuals, supplied the necessary funds, of which the treasury of the state was wholly destitute.<sup>1</sup> At one time, so general was the prevalence of discontent, even among the militia on whom the government were obliged to rely, that men were known openly to change sides in the field, when the first bodies of troops were called out.<sup>2</sup> Had the government of the state been in the hands of a person less firm and less careless of popularity than Bowdoin, it would have been given up to anarchy and civil confusion. The political situation of the country did not seem to admit of an application to Congress for direct assistance, and there is no reason to suppose that such an application would have been effectively answered, if it had been made.<sup>3</sup>

When the news of the disturbances in Massachusetts, in the autumn of 1786, was received in Congress, it happened that intelligence from the western country indicated a hostile disposition on the part of several Indian tribes against the frontier settlements. A resolve was unanimously adopted, directing one thousand three hundred and forty additional troops to be raised, for the term of three years, for the protection and support of the states bordering on the western territory and the settlements on and near the Mississippi, and to secure and facilitate the survey-

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<sup>1</sup> Governor Bowdoin's Speech to the legislature, February 3, 1787.

<sup>2</sup> Minot.

<sup>3</sup> In the spring of 1786 the state had asked the loan from Congress of sixty pieces of field artillery. The application was refused, by the negative vote of six states out of eight, one being divided, and the delegation from Massachusetts alone supporting it. Journals, XI. 65-67. April 19, 1786.

ing and selling of the public lands.<sup>1</sup> From the fact that the whole of these troops were ordered to be raised by the four New England States and one half of them by the state of Massachusetts, and from other circumstances, it is quite apparent that the object assigned was an ostensible one, and that Congress intended by this resolve to strengthen the government of that state and to overawe the insurgents.<sup>2</sup> But this motive could not be publicly announced. The enlistment went on very slowly, however, until February, when a motion was made by Mr. Pinckney of South Carolina to stop it altogether, upon the ground that the insurrection in Massachusetts, the real, though not the ostensible, object of the resolve, had been crushed. Mr. King of Massachusetts earnestly entreated that the federal enlistments might be permitted to go on, otherwise the greatest alarm would be felt by the government of the state and its friends, and the insurrection might be rekindled. Mr. Madison advised that the proposal to rescind the order for the enlistments should be suspended, to await the course of events in Massachusetts. At the same time he admitted that it would be difficult to reconcile an interference of Congress in the internal controversies of a state with the tenor of the Articles of Confederation.<sup>3</sup> The whole subject was postponed, and the direct question of the power of Congress was not acted upon. In the convention which framed the Constitution it was very early declared that the Confederation had neither constitutional power nor means to interfere in case of a rebellion in any state.<sup>4</sup>

No subsequent generation can depict to itself the alarm which these disturbances spread through the country, and the extreme peril to which the whole fabric of society in New England was exposed. The numbers of the disaffected in Massachusetts amounted to one fifth of the inhabitants in several of the populous counties. Their doctrines and purposes were embraced by many

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<sup>1</sup> Journals, XI. 258. October 30, 1786.

<sup>2</sup> It was well understood, for instance in the legislature of Virginia, that this was the real purpose; for Mr. Madison says that this consideration inspired the ardor with which they voted, towards their quota of the funds called for to defray the expenses of this levy, a tax on tobacco, which would scarcely have been granted for any other purpose, as its operation was very unequal. Elliot's Debates, V. 95. February 19, 1787.

<sup>3</sup> Ibid.

<sup>4</sup> Ibid., 127.

young, active, and desperate men in Rhode Island, Connecticut, and New Hampshire, and the whole of this faction in the four states was capable of furnishing a body of twelve or fifteen thousand men, bent on annihilating property, and cancelling all debts, public and private.<sup>1</sup>

But this great peril was not without beneficial consequences. It displayed, at a critical moment, when a project of amending the Confederation for other purposes was encountering much opposition, a more dangerous deficiency than any to which the public mind had hitherto been turned. While thoughtful and considerate men were speculating upon the causes of diminished prosperity and the general feebleness of the system of government, a gulf suddenly yawned beneath their feet, threatening ruin to the whole social fabric. It was but a short time before that the people of this country had shed their blood to obtain constitutions of their own choice and making. Now they seemed as ready to overturn them as they had once been to extort from tyranny the power of creating and erecting them in its place. It was manifest that to achieve the independence of a country is but half of the great undertaking of liberty; that, after freedom, there must come security, order, the wise disposal of power, and great institutions, on which society may repose in safety. It was clear that the Federal Union alone could certainly uphold the liberty which it had gained for the people of the states, and that, to enable it to do so, it must become a government.<sup>2</sup>

From his retreat at Mount Vernon, Washington observed the progress of these disorders with intense anxiety. To him they carried the strongest evidence of a want of energy in the system of the Federal Union. They did more than all things else to convince him that "a liberal and energetic constitution, well checked

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<sup>1</sup> This was the estimate of their numbers formed by General Knox, on careful inquiry, and by him given to Washington. See a letter from Washington to Mr. Madison. Works, IX. 207.

<sup>2</sup> Washington, writing to Henry Lee in Congress, October 31, 1786, says: "You talk, my good sir, of employing influence to appease the present tumults in Massachusetts. I know not where that influence is to be found, or, if attainable, that it would be a proper remedy for the disorders. *Influence* is not *government*. Let us have a government by which our lives, liberties, and properties will be secured, or let us know the worst at once." Works, IX. 204.

and well watched to prevent encroachments, might restore us to that degree of respectability and consequence to which we had the fairest prospect of attaining.”<sup>1</sup> He was kept accurately informed of the state of things in New England, and the probability that he would be obliged to come forward and take an active part in the support of order against civil discord was directly intimated to him.<sup>2</sup> He had foreseen the possibility of this; but the successful issue of the struggle relieved him from the contemplation of this painful task, and left to him only the duty of giving the whole weight of his influence and presence in the Convention, which was to assemble in the following May, for the revision of the federal system.

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<sup>1</sup> Works, IX. 208.

<sup>2</sup> Ibid. 221.



## CHAPTER XIII.

### ORIGIN AND NECESSITY OF THE POWER TO REGULATE COMMERCE.

AMONG all the causes which led to the establishment of the Constitution of the United States there is none more important, and none that is less appreciated, than the inability of the Confederation to manage the foreign commerce of the country. We have seen that, when the Articles of Confederation were proposed for adoption by the states, the state of New Jersey remonstrated against the absence of all provision for placing the foreign trade of the states under the regulation of the federal government. But this remonstrance was without effect, and the instrument went into operation in 1781, with no other restriction upon the powers of the states to regulate trade according to their pleasure than a prohibition against levying imposts or duties which would interfere with the treaties then proposed. While the war continued, the subject was of comparatively little importance. But the return of peace found this country capable of becoming a great commercial as well as agricultural nation; and it could not be overlooked that its government possessed very inadequate means for establishing such relations with foreign powers as would best develop its resources and conduce to its internal harmony and prosperity. How early this great interest had attracted the attention of those who were most capable of enlarged and statesman-like views of the actual nature of the Union and the wants of the states there are some means of determining. We know that, before the peace, Hamilton saw clearly that it was essential for the United States to be vested with a general superintendence of trade, both for purposes of revenue and regulation; that he foresaw the encouragement of our own products and manufactures by means of general prohibitions of particular articles and a judicious arrangement of duties, and that this could only be effected by a central authority; and that the due observance of any com-

mercial treaty which the United States might make with a foreign power could not be expected, if the different states retained the regulation of their own trade, and thus held the practical construction of treaties in their own hands.<sup>1</sup>

But it does not appear that, among the other principal statesmen of the Revolution, these ideas had made much progress until the entire incapacity of the Confederation to negotiate advantageous commercial treaties, for want of adequate power to enforce them, had displayed the actual weakness of its position, and the oppressive measures of other countries had taught them that there was but one remedy for such evils. Then, indeed, they saw that the United States could have a standing as a commercial power among the other powers of the world only when their representatives could be received and dealt with as the representatives of one, and not of thirteen sovereignties; and that if the measures of other countries, injurious to the trade of America, were to be counteracted at all, it must be by a power that could prohibit access to all the states alike, or grant it as to all, as circumstances might require.<sup>2</sup>

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<sup>1</sup> Life of Hamilton, II. 233, 234. See also his resolutions on the defects of the federal government, intended to be offered in Congress in 1783, and especially the eighth resolution. Works of Hamilton, II. 269.

<sup>2</sup> Hamilton himself, in some papers which he published in 1781, under the title of "The Continentalist," gave the general sum of American statesmanship and its opportunities down to that period. The events of the next seven years gave it a wonderful development. "It would be the extreme of vanity in us," said he, "not to be sensible that we began this revolution with very vague and confined notions of the practical business of government. To the greater part of us it was a novelty; of those who, under the former Constitution, had had opportunities of acquiring experience, a large proportion adhered to the opposite side, and the remainder can only be supposed to have possessed ideas adapted to the narrow colonial sphere in which they had been accustomed to move, not of that enlarged kind suited to the government of an independent nation. There were, no doubt, exceptions to these observations—men in all respects qualified for conducting the public affairs with skill and advantage—but their number was small; they were not always brought forward in our councils, and when they were their influence was too commonly borne down by the prevailing torrent of ignorance and prejudice. On a retrospect, however, of our transactions, under the disadvantages with which we commenced, it is perhaps more to be wondered at that we have done so well, than that we have not done better. There are, indeed, some traits in our conduct as conspicuous for sound

The actual commercial relations of the United States with other countries, when the peace took place, were confined to treaties of amity and commerce with France, Sweden, and the Netherlands; the two latter transcending, in some degree, the powers of the Confederation. In 1776 the Revolutionary Congress had adopted a plan of treaties to be proposed to France and Spain, which contemplated that the subjects of each country should pay no duties in the other except such as were paid by natives, and should have the same rights and privileges as natives in respect to navigation and commerce.<sup>1</sup> When a treaty of amity and commerce came to be concluded with France, in 1778, the footing on which the subjects of the two countries were placed, in the dominions of each other, was that of the most favored nations, instead of that of natives.<sup>2</sup> The Articles of Confederation, proposed in 1777, and finally ratified in March, 1781, reserved to the states the right of levying duties and imposts, excepting only such as would interfere with any treaties that might be made "pursuant to the treaties proposed to France and Spain." The United States could, therefore, constitutionally complete these two treaties, and such as were dependent upon them, but no others which should have the effect of restraining the legislatures of the states from prohibiting the exportation or importation of any species of goods or merchandise, or laying whatever duties or imposts they thought proper.<sup>3</sup>

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policy as others for magnanimity. But, on the other hand, it must also be confessed there have been many false steps, many chimerical projects and Utopian speculations, in the management of our civil as well as of our military affairs. A part of these were the natural effects of the spirit of the times, dictated by our situation. An extreme jealousy of power is the attendant on all popular revolutions, and has seldom been without its evils. It is to this source we are to trace many of the fatal mistakes which have so deeply endangered the common cause, particularly that defect which will be the object of these remarks—a want of power in Congress." Works, II. 186.

<sup>1</sup> Secret Journals, II. 7, 8.

<sup>2</sup> Ibid. 59.

<sup>3</sup> Articles of Confederation, Art. VI., IX. The expression in the *sixth* article was: "No state shall lay any imposts, etc., that shall interfere with any stipulations in treaties entered into by the United States with any king, prince, or state, *in pursuance of* any treaties already proposed by Congress to the court of France and Spain." The *ninth* article saved to the states the general power of levying duties and laying prohibitions.

In 1782, negotiations were entered into for a similar treaty with the States-General of the Netherlands. When the instructions to Mr. Adams to negotiate this treaty were under consideration in Congress, it was recollected that the French treaty contained a stipulation the effect of which would enable the heirs of the subjects of either party, dying in the territories of the other, to inherit real property, without obtaining letters of naturalization.<sup>1</sup> The doubt suggested itself—as it well might—whether such an indefinite license to aliens to possess real property within the United States was not an encroachment upon the rights of the states. It seems to have been expected, when the French treaty was entered into, that the states would acquiesce in this provision, on account of the peculiar relations of this country to France, and because of the saving clause in the Articles of Confederation in favor of the treaties to be made with that power and with Spain.\* But such a stipulation as this was clearly not within the meaning of that clause; and it was received with great repugnance by many of the states.\* In the treaty with the Netherlands it was proposed to insert a similar provision; but it was found to be extremely improbable that the states would comply with a similar engagement with another power. The language was therefore varied, so as to give the privilege of inheritance only as to the “effects” of persons dying in the country—an expression which would probably exclude real property, but which might possibly be construed to include it.<sup>4</sup>

With regard to duties and imposts, the Dutch treaty contained the same stipulation as the French, putting the subjects of either power on the footing of the most favored nations, and thereby holding out to the subjects of the United Provinces the promise of an equality, under the laws of the United States, with the sub-

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<sup>1</sup> Secret Journals, II. 65, 66. Art. XIII. of the Treaty of Amity and Commerce with France. The expression employed was, “goods movable and immovable,” and the right of succession was given, *ab intestato*, without first obtaining letters of naturalization.

\* See a report on this *projet* of the treaty, made by Mr. Madison, July 17, 1782. Secret Journals, II. 142–144.

\* Ibid.

\* Art. VI. of the Treaty of Amity and Commerce with the Netherlands, executed by Mr. Adams at the Hague, October 8, 1782. Journals, VIII. 96.

jects of France.<sup>1</sup> The same stipulation was inserted in a treaty subsequently made at Paris with the King of Sweden.<sup>2</sup>

If these stipulations were supposed or intended to be binding upon the states, so as to restrain them from adopting, within their respective jurisdictions, any other rule than that fixed by the French treaty, for the subjects of the United Provinces and the King of Sweden, it is quite clear that the Articles of Confederation gave no authority to Congress to make them. They could have no effect, therefore, in producing a uniformity of regulation throughout the United States with regard to the trade with Sweden and the Netherlands.

The relations of the United States with Great Britain were, however, far more important than their relations with Sweden or Holland. When the war was drawing to a close, and the provisional articles of peace had been agreed upon, a measure was in preparation in England, under the auspices of Mr. Pitt, designed as a temporary arrangement of commercial intercourse between Great Britain and the United States, and which would have enabled the government of this country to have formed a treaty so advantageous that the states would doubtless have conformed their legislation to its provisions. That great statesman perceived that it was extremely desirable to establish the intercourse of the two countries on the most enlarged principles of reciprocal benefit, and his purpose was, by a provisional arrangement, to evince the disposition of England to be on terms of amity with the United States, preparatory to the negotiation of a treaty.<sup>3</sup> But the administration, in which he was then Chancellor of the Exchequer, went out of office immediately after he had proposed this measure, and their successors, following a totally different line of policy, procured an act of Parliament authorizing the king in council to regulate the commercial intercourse between the United States and Great Britain and her dependencies.<sup>4</sup>

Mr. Pitt's bill was designed to admit the vessels and subjects of the United States into all the ports of Great Britain in the

<sup>1</sup> Art. II. and III. of the Treaty of Amity and Commerce with the Netherlands, executed by Mr. Adams at the Hague, October 8, 1782. Journals, VIII. 96.

<sup>2</sup> April 3, 1783. Journals, VIII. 386-398.

<sup>3</sup> Mr. Pitt's bill was brought in in March, 1783, and he went out of office immediately afterwards.

<sup>4</sup> April, 1783.

same manner as the subjects and vessels of other independent sovereign states, and to admit merchandise and goods, the growth, produce, or manufacture of this country, under the same duties and charges as if they were the property of British subjects, imported in British vessels. It also proposed to establish an entirely free trade between the United States and the British islands, colonies, and plantations in America. The new administration, on the contrary, believing that this would encourage the American marine, to the ruin of that of Great Britain, and would deprive the latter of a monopoly in the consumption of her colonies, and in their carrying trade, resolved to reverse this entire policy. In this course they were encouraged by the views which they took of the internal situation of this country, and which were, to a great extent, justified by the fact. They believed that we could not act, as a nation, upon questions of commerce; that the climates, the staples, and the manners of the states were different, and their interests therefore opposite; and that no combination was likely to take place from which England would have reason to fear retaliation. They supposed that, inasmuch as the Confederation had no power to make any but general treaties, and as the states had reserved to themselves nearly every power concerning the regulation of trade, no treaty could be made that would be binding upon all the states; and that, if treaties should become necessary, they must be made with the states respectively. But they denied that treaties were necessary, and maintained that it would be unwise to enter at present into any arrangements by which they might not wish afterwards to be bound. They determined, therefore, to deal with this country as a collection of rival states, with each of which they could make their own terms, after the pressure of their policy, and the impossibility of escaping from its effects, had begun to be felt. They accordingly began, by excluding from the British West Indies, under orders in council, the whole American marine, and by prohibiting fish, and many important articles of our produce, from being carried there, even in British vessels.<sup>1</sup>

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<sup>1</sup> July, 1783. Their idea was that, if the American states should choose to send consuls, they should be received, and consuls sent to them in return; that each state would soon enter into all necessary regulations with the consul, and

At the termination of the war the foreign commerce of the United States was capable of great expansion. It consisted of three important branches—the trade of the Eastern, that of the Middle, and that of the Southern States ; each of which required at once the means of reaching foreign markets. The rice and indigo of the South might be carried to Europe. The Middle States might export to Europe tobacco, tar, wheat, and flour ; and to the West Indies, pork, beef, bread, flour, lumber, tar, and iron. The Eastern States might supply the markets of Europe with spars, ship-timber, staves, boards, fish, and oil, and those of the West Indies with lumber, pork, beef, live cattle, horses, cider, and fish. The whole of these great interests of course received a sudden and almost fatal blow from the English Orders in Council, and no means whatever existed of countervailing their effects but such as each state could provide for its own people by its own legislation.

Congress, however, awoke to the perception of an efficient and appropriate remedy, of a temporary character, and prepared to apply it, through an amendment of their powers. For the purpose of meeting the policy of Great Britain with similar restrictions on her commerce, they recommended to the states to vest in Congress, for the term of fifteen years, authority to prohibit the vessels of any power, not having treaties of commerce with the United States, from importing or exporting any commodities into or from any of the states, and also with the power of prohibiting, for a like term, the subjects of any foreign country, unless authorized by treaty, from importing into the United States any merchandise not the produce or manufacture of such country.<sup>1</sup> There was already before the states, as we have seen, in the revenue system of 1783, a proposal to them to vest in Congress power to levy certain duties on foreign commodities, for the same period ; and if these two grants of power had been made, and made promptly, by the states, Congress would have possessed, for a time, an effectual control over commerce, and the practical means of forming suitable commercial treaties.

But the proposal of the 30th of April, 1784, met with a tardy and reluctant attention among the states. Only one of them had acted upon it, as late as the following February, when the deletion of nothing more was necessary. See Lord Sheffield's Observations on American Commerce.

<sup>1</sup> April 30, 1784.

gates for Maryland laid before Congress an act of that state upon the subject.<sup>1</sup> New Hampshire was the next state to comply, in the succeeding June.<sup>2</sup> In the meantime, however, Congress prepared to prosecute negotiations in Europe, trusting to the chances of an enlargement of their powers, in pursuance of their recommendation. Accordingly, they proceeded, in the spring of 1784, to appoint a commission to negotiate commercial treaties, and settled the principles on which such treaties were to be formed. The leading principle then determined on was, that each party to the treaty should have a right to carry their own produce, manufactures, and merchandise in their own bottoms to the ports of the other, and to take thence the produce, manufactures, and merchandise of the other, paying, in both cases, such duties only as were paid by the most favored nation. The resolves appointing the commission also contained a very explicit direction that "the United States, in all such treaties, and in every case arising under them, should be considered as one nation, upon the principles of the Federal Constitution."<sup>3</sup> Yet the Federal Constitution did not, at that very moment, make the United States one nation for this purpose. Its principles gave to Congress no authority which could prevent the states from prohibiting any exportations or importations whatever, as to their respective territories; and the validity of these treaties, thus proposed to be negotiated with fifteen European powers, depended altogether upon the precarious assent of the thirteen states to the alterations in the principles of the Federal Constitution which Congress had proposed.

That assent was not likely to be given so as to become effectual for the purposes for which it had been asked. The action of the states was found, in the spring of 1786, to present a mass of incongruities which rendered the whole scheme of thus increasing

<sup>1</sup> February 14, 1785. Journals, X. 53.

<sup>2</sup> By an act passed June 22-23, 1785; laid before Congress October 10, 1785. Ibid. 353.

<sup>3</sup> The commission consisted of Mr. John Adams, then at the Hague, Dr. Franklin, then in France, and Mr. Jefferson, then in Congress. Mr. Jefferson sailed from Boston on the 5th of July, and arrived in Paris on the 6th of August, 1784 (Works, I. 49). The powers with whom they were to negotiate commercial treaties were Russia, Austria, Prussia, Denmark, Saxony, Hamburg, Great Britain, Spain, Portugal, Genoa, Tuscany, Rome, Naples, Venice, Sardinia, and the Ottoman Porte. Secret Journals, III 484-489. May 7, 1784.



the federal powers almost hopeless. Four of the states had passed laws conforming substantially to the recommendations of Congress, but restraining their operation until the other states should have complied.<sup>1</sup> Three of the states had passed the requisite acts, and had fixed different periods at which they were to take effect.<sup>2</sup> One state had granted full powers to regulate its trade, by restrictions or duties, for fifteen years, with a proviso that the law should be suspended until all the other states had done the same.<sup>3</sup> Another state had granted power, for twenty-five years, to regulate trade between the respective states, and to prohibit or regulate the importation only of foreign goods in foreign vessels, but restricting the operation of the act until the other states had passed similar laws.<sup>4</sup> Still another state had granted powers like the last, but without limitation of time, and with the proviso that, when all the other states had made the same grants, it should become an article of the Confederation.<sup>5</sup> The three remaining states had passed no act upon the subject.<sup>6</sup> Upon these conflicting and irreconcilable provisions Congress could take no other action than to call the attention of the states again to the original proposal, and request them to revise their laws.<sup>7</sup>

While this discordant legislation was manifesting at home the entire impracticability of amending the Federal Constitution by means of the separate action of the state legislatures, the commissioners abroad were engaged in efforts, nearly as fruitless, to negotiate the treaties which they had been instructed to make. The commission was opened at Paris on the 13th of August, 1784, and its objects announced to the different governments. France was not disposed to change the existing relations. England perceived the real want of power in the federal government, and recognized nothing in the commission but the fact that it had been issued by Congress, while the separate states had conferred no powers upon either Congress or the commissioners.<sup>8</sup> Prussia alone entered into

<sup>1</sup> Massachusetts, New York, New Jersey, and Virginia.

<sup>2</sup> Connecticut, Pennsylvania, and Maryland.

<sup>3</sup> New Hampshire.

<sup>4</sup> Rhode Island.

<sup>5</sup> North Carolina.

<sup>6</sup> Delaware, South Carolina, and Georgia.

<sup>7</sup> See a report made in Congress, March 3, 1786. Journals, XI. 41.

<sup>8</sup> The Duke of Dorset, the English ambassador at Paris, wrote to the commissioners (March 26, 1785) as follows: "Having communicated to my court the

a treaty upon some of the principles laid down in the commission, and soon after it was executed the commissioners ceased to do anything whatever.<sup>1</sup>

During the period which elapsed from the Treaty of Peace with England to the assembling of the Convention at Annapolis, the legislation of the different states, designed to protect themselves against the policy of England, was of course without system or concert, and without uniformity of regulation. At one time duties were made extravagantly high; at another competition reduced them below the point at which any considerable revenue could be derived. At one time the states acted in open hostility to each other; at another they contemplated commercial leagues, without regard to the prohibition contained in the Articles of Confederation. No steady system was pursued by any of them, and the inefficacy of state legislation became at length so apparent that a conviction of the necessity of new powers in Congress forced itself upon the public mind.

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readiness you expressed in your letter to me of the 9th of December to remove to London, for the purpose of treating upon such points as may materially concern the interests, both political and commercial, of Great Britain and America, and having at the same time represented that you declared yourselves to be fully authorized and empowered to negotiate, I have been, in answer thereto, instructed to learn from you, gentlemen, what is the real nature of the powers with which you are invested—whether you are merely commissioned by Congress, or whether you have received separate powers from the respective states. A committee of North American merchants have waited upon his majesty's principal secretary of state of foreign affairs, to express how anxiously they wished to be informed upon this subject, repeated experience having taught them in particular, as well as the public in general, how little the authority of Congress could avail in any respect where the interest of any one individual state was even concerned, and particularly so where the concerns of that state might be supposed to militate against such resolutions as Congress might think proper to adopt. The apparent determination of the respective states to regulate their own separate interests renders it absolutely necessary, towards forming a permanent system of commerce, that my court should be informed how far the commissioners can be duly authorized to enter into any engagements with Great Britain which it may not be in the power of any one of the states to render totally fruitless and ineffectual." *Diplomatic Correspondence*, II. 297.

<sup>1</sup> Jefferson's Works, I. 50, 51. The whole proceedings of this commission may be found in the *Diplomatic Correspondence*, II. 193-346.

## CHAPTER XIV.

1783-1787.

### THE PUBLIC LANDS.—GOVERNMENT OF THE NORTHWESTERN TERRITORY.—THREATENED LOSS OF THE WESTERN SETTLEMENTS.

THE Confederation, although preceded by a cession of western territory from the state of New York for the use of the United States, contained no grant of power to Congress to hold, manage, or dispose of such property. There had been, while the Articles of Confederation were under discussion in Congress, a proposal to insert a provision giving to Congress the sole and exclusive right and power to ascertain and fix the western boundary of such states as claimed to the Mississippi or the "South Sea," and to lay out the land beyond the boundary so ascertained into separate and independent states from time to time, as the numbers and circumstances of the inhabitants might require.<sup>1</sup> This proposal was negatived by the vote of every state except Maryland and New Jersey.<sup>2</sup> Its rejection caused the adoption of the Confederation to be postponed for a period of more than two years after it was submitted to the states.<sup>3</sup> Virginia had set up claims to an indefinite extent of territory, stretching far into the western wilderness, which were looked upon with especial jealousy by Maryland; and when the Articles of Confederation came before the legislature of that state for consideration, the absence of any provision vesting in the Union any control over these claims, or any power to ascertain and fix the western boundaries of the great states, became at once a cause of irritation and alarm. The steps taken by Maryland to have this power introduced into the Articles have already been detailed.<sup>4</sup> But the Articles could not be amended. Congress

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<sup>1</sup> October 15, 1777. Secret Journals, I. 328.

<sup>2</sup> Ibid.

<sup>3</sup> See the account of the adoption of the Confederation, ante, pp. 90-97.

<sup>4</sup> Ante, pp. 90-94.

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During the period which elapsed from the Treaty of Peace with England to the assembling of the Convention at Annapolis, the legislation of the different states, designed to protect themselves against the policy of England, was of course without system or concert, and without uniformity of regulation. At one time duties were made extravagantly high; at another competition reduced them below the point at which any considerable revenue could be derived. At one time the states acted in open hostility to each other; at another they contemplated commercial leagues, without regard to the prohibition contained in the Articles of Confederation. No steady system was pursued by any of them, and the inefficacy of state legislation became at length so apparent that a conviction of the necessity of new powers in Congress forced itself upon the public mind.

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readiness you expressed in your letter to me of the 9th of December to remove to London, for the purpose of treating upon such points as may materially concern the interests, both political and commercial, of Great Britain and America, and having at the same time represented that you declared yourselves to be fully authorized and empowered to negotiate, I have been, in answer thereto, instructed to learn from you, gentlemen, what is the real nature of the powers with which you are invested—whether you are merely commissioned by Congress, or whether you have received separate powers from the respective states. A committee of North American merchants have waited upon his majesty's principal secretary of state of foreign affairs, to express how anxiously they wished to be informed upon this subject, repeated experience having taught them in particular, as well as the public in general, how little the authority of Congress could avail in any respect where the interest of any one individual state was even concerned, and particularly so where the concerns of that state might be supposed to militate against such resolutions as Congress might think proper to adopt. The apparent determination of the respective states to regulate their own separate interests renders it absolutely necessary, towards forming a permanent system of commerce, that my court should be informed how far the commissioners can be duly authorized to enter into any engagements with Great Britain which it may not be in the power of any one of the states to render totally fruitless and ineffectual." *Diplomatic Correspondence*, II. 297.

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1783-1787.

### THE PUBLIC LANDS.—GOVERNMENT OF THE NORTHWESTERN TERRITORY.—THREATENED LOSS OF THE WESTERN SETTLEMENTS.

THE Confederation, although preceded by a cession of western territory from the state of New York for the use of the United States, contained no grant of power to Congress to hold, manage, or dispose of such property. There had been, while the Articles of Confederation were under discussion in Congress, a proposal to insert a provision giving to Congress the sole and exclusive right and power to ascertain and fix the western boundary of such states as claimed to the Mississippi or the "South Sea," and to lay out the land beyond the boundary so ascertained into separate and independent states from time to time, as the numbers and circumstances of the inhabitants might require.<sup>1</sup> This proposal was negatived by the vote of every state except Maryland and New Jersey.<sup>2</sup> Its rejection caused the adoption of the Confederation to be postponed for a period of more than two years after it was submitted to the states.<sup>3</sup> Virginia had set up claims to an indefinite extent of territory, stretching far into the western wilderness, which were looked upon with especial jealousy by Maryland; and when the Articles of Confederation came before the legislature of that state for consideration, the absence of any provision vesting in the Union any control over these claims, or any power to ascertain and fix the western boundaries of the great states, became at once a cause of irritation and alarm. The steps taken by Maryland to have this power introduced into the Articles have already been detailed.<sup>4</sup> But the Articles could not be amended. Congress

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<sup>1</sup> October 15, 1777. Secret Journals, I. 328.

<sup>2</sup> Ibid.

<sup>3</sup> See the account of the adoption of the Confederation, ante, pp. 90-97.

<sup>4</sup> Ante, pp. 90-94.

could only make efforts to remove this impediment to their adoption by recommending to the states to cede their territorial claims to the Union. The first step which they took for this purpose was to recommend to the state of Virginia, and all the other states similarly situated, not to make sales of unappropriated lands during the continuance of the war.<sup>1</sup> This was followed by a full consideration of the subject presented by the objections of Maryland and the remonstrance of Virginia. Declining to reopen the question of the merits or policy of attempting to engraft the proposed power upon the Confederation, Congress deemed it more advisable to endeavor to procure a surrender of a portion of the territorial claims of the several states.<sup>2</sup> In pressing a recommendation to this effect they were greatly aided by the course of the state of New York, which had already authorized its delegates in Congress to limit its western boundaries, and to cede a portion of its vacant lands to the United States.<sup>3</sup> They then immediately declared, by resolve, the purposes for which such cessions were to be held. The territories were to be disposed of for the common benefit of the United States; to be settled and formed into distinct republican states, which should become members of the Federal Union, and have the same rights of sovereignty, freedom, and independence as the other states. Each state so formed was to contain a suitable extent of territory, not less than one hundred nor more than one hundred and fifty miles square; the necessary expenses incurred by any state in acquiring the territory ceded were to be reimbursed, and the lands were to be granted or settled at such times and under such regulations as should thereafter be agreed upon by the United States in Congress assembled, or any nine or more of them.<sup>4</sup>

The cessions were made under the guarantees of this resolve. Strictly speaking, there was no express constitutional power under which Congress could thus act, either before or after the adoption of the Articles of Confederation. Before that period, if the United States could acquire and hold lands for any purpose, it could only be by the common attribute of sovereignty belonging to every government. Perhaps this power existed, by implication, in the

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<sup>1</sup> October 30, 1779. Journals, V. 401, 402.

<sup>2</sup> September 6, 1780.

<sup>3</sup> February 19, 1780.

<sup>4</sup> October 10, 1780.

revolutionary government; but the compact which was to constitute the new government contained no authority for the establishment of new states within the limits of the Union. But when, aside from the Articles of Confederation, and before they had been adopted, the Revolutionary Congress undertook, in 1780, to hold out these inducements to the states, as motives for their adoption of that instrument, and these motives were acted upon and the cessions made, it must be taken that the territory came rightfully into the possession of the United States. Whether the adoption of the Articles, containing no power for the government of such territories or for the admission of new states into the Union, did not place the new government in a position where, if it acted at all, it would act beyond the scope of its constitutional authority, certainly admitted of grave question.<sup>1</sup> But the acquisition of the territory itself rested upon acts which were so directly and expressly connected with the establishment of the new union under the Confederation as to make the acquisition itself part of the fundamental conditions of that union, and the principal guarantee of its continuance. Among the declared purposes for which these acquisitions were made was that of forming them into new states, to be admitted into the Union; and as all the states acquiesced in and embraced this purpose, they may be said to have conferred upon Congress an implied power to legislate to carry it into effect. Still, the want of an express authority in the Articles thus to deal with acquired territory was afterwards felt and insisted upon, as the Confederation drew towards the close of its career.<sup>2</sup>

Virginia, in 1781, offered to make a cession to the United States of her title to lands northwest of the Ohio, upon certain conditions, which were not satisfactory, and the subject had not been acted upon in Congress when the revenue system of 1783 was adopted for recommendation to the states. Looking to the prospect of vacant lands, as a means of hastening the extinguishment of the public debts, as well as of establishing the harmony of the Union, Congress accompanied the recommendation of the revenue system by new solicitations to the states which had made no cessions of their public lands, or had made them in part only, to comply fully

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<sup>1</sup> The Federalist.

<sup>2</sup> Ibid.

with the former recommendations. This drew from the state of New Jersey, apprehensive that the offer of Virginia might be accepted, a remonstrance against the cession proposed by that state, as partial, unjust, and illiberal.<sup>1</sup> Congress again took the subject into consideration, examined the conditions which the legislature of Virginia had annexed to their proposed grant, declared some of them inadmissible, and stated the conditions on which the cession could be received.<sup>2</sup> Virginia complied with the terms proposed by Congress, and upon those terms ceded to the United States all right, title, and claim, both of soil and jurisdiction, which the state then had to the territory within the limits of its charter, lying to the northwest of the river Ohio. That magnificent region, in which now lie the powerful states of Ohio, Indiana, Illinois, Michigan, and Wisconsin, became the property of the United States, by a grant of twenty lines, executed in Congress by Thomas Jefferson and three of his colleagues; on the 1st day of March, 1784.<sup>3</sup>

Soon after this cession had been completed, Congress passed a resolve for the regulation of the territory that had been or might be ceded to the United States, for the establishment of temporary and permanent governments by the settlers, and for the admission

<sup>1</sup> June 20, 1783.

<sup>2</sup> September 13, 1783.

<sup>3</sup> The granting part of the deed of cession, exclusive of its recitals, is as follows: "That we, the said Thomas Jefferson, Samuel Hardy, Arthur Lee, and James Monroe, by virtue of the power and authority committed to us by the act of the said General Assembly of Virginia before recited, and in the name and for and on behalf of the said commonwealth, do by these presents convey, transfer, assign, and make over unto the United States in Congress assembled, for the benefit of the said states, Virginia inclusive, all right, title, and claim, as well of soil as of jurisdiction, which the said commonwealth hath to the territory or tract of country within the lines of the Virginia charter, situate, lying, and being to the northwest of the river Ohio, to and for the uses and purposes, and on the conditions, of the said recited act." The cession was made with the reservation of such a portion of the territory ceded, between the rivers Scioto and Little Miami, as might be required to make up the deficiencies of land on the south side of the Ohio, called the Green River lands, reserved for the Virginia troops on continental establishment (Journals, IX. 67-69). Subsequently the act of cession was altered, so as to admit of the formation of not more than five, nor less than three states, of a size more convenient than that described in the act of cession and in the resolve of October 10, 1780. Journals, XI. 139, 140. July 9, 1786.



of the new states thus formed into the Union.' This resolve provided that the territory which had been or might be ceded to the United States, after the extinguishment of the Indian title, and when offered for sale by Congress, should be divided into separate states, in a manner specified; that the settlers on such territory, either on their own petition or on the order of Congress, should receive authority to form a temporary government; and that when there should be twenty thousand free inhabitants within the limits of any of the states thus designated, they should receive authority to call a convention of representatives to establish a permanent constitution and government for themselves, provided that both the temporary and permanent governments should be established on these principles, as their basis: 1. That they should forever remain a part of the Confederacy of the United States of America. 2. That they should be subject to the Articles of Confederation and the acts and ordinances of Congress, like the original parties to that instrument. 3. That they should in no case interfere with the disposal of the soil by Congress. 4. That they should be subject to pay a part of the federal debts, present and prospective, in the same measure of apportionment with the other states. 5. That they should impose no tax upon lands the property of the United States. 6. That their respective governments should be republican. 7. That the lands of non-resident proprietors should not be taxed higher than those of residents, in any new state, before its delegates had been admitted to vote in Congress.

The resolve also contained a provision which appears to have been designed to meet the want of constitutional power, under the Articles of Confederation, relative to the admission of new states. It was declared that whenever any of the states thus formed should have as many free inhabitants as the least numerous of the thirteen original states, it should be admitted by its delegates into Congress on an equal footing with the original states, provided the assent of so many states in Congress should be first obtained, as might at the time be competent to such admission. It was further declared that, in order to adapt the Articles of Confederation to the condition of Congress when it should be thus increased, it should be proposed to the original states, parties to that instru-

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<sup>1</sup> April 23, 1784. Journals, IX. 153.

ment, to change the rule which required a vote of nine states, to a vote of two thirds of all the states in Congress; and that when this change had been agreed upon, it should be binding upon the new states.

After the establishment of a temporary government, and before its admission into the Union, each of the new states was to have the right to keep a member in Congress, with the privilege of debating, but not of voting. It was also provided that measures not inconsistent with the principles of the Confederation, and necessary for the preservation of peace and good order among the settlers in any of the said new states, until they had assumed a temporary government, might, from time to time, be taken by the United States in Congress assembled.

These provisions were to stand as a charter of compact and as fundamental constitutions between the thirteen original states and each of the new states thus described, unalterable from and after the sale of any part of the territory of such state, but by the joint consent of the United States in Congress assembled, and of the particular state to be affected.<sup>1</sup>

New and urgent recommendations followed the passage of this resolve, pressing the states to consider that the war was now happily brought to a close, by the services of the army, the supplies of property by citizens, and loans of money by citizens and foreigners, constituting a body of creditors who had a right to expect indemnification, and that the vacant territory was an important resource for this great object.<sup>2</sup>

The subject does not seem to have again occupied the attention of Congress until the spring of the following year, when a proposition was introduced and committed, to exclude slavery and involuntary servitude, otherwise than in punishment of crimes, from the states described in the resolve of April 23d, 1784, and to make this provision part of the compact established by that resolve.<sup>3</sup>

Soon afterwards, a cession was made by Massachusetts of all its right and title, both of soil and jurisdiction, to the western

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<sup>1</sup> April 23, 1784. Journals, IX. 153.      <sup>2</sup> April 20, 1784. Journals, IX. 184.

<sup>3</sup> This proposition was introduced by Rufus King, March 16, 1785, and was committed by the votes of *eight* states against *four*.

territory lying within the limits of the charter of that state.<sup>1</sup> In the succeeding month, Congress adopted an ordinance for ascertaining the mode of disposing of the western lands to settlers.<sup>2</sup> In the course of the next year, the cession by Connecticut was made, after various negotiations, with a reservation to that state of the property in a considerable tract of country, since called the Connecticut Reserve, lying to the south of Lake Erie, and now embraced within the state of Ohio.<sup>3</sup>

Before this transaction had been completed, it had become manifest, from the knowledge that had been obtained of the country northwest of the Ohio, that it would be extremely inconvenient to lay it out into states of the extent and dimensions described in the resolve of October 10th, 1780, under which the cession of Virginia had been made; and the legislature of that state were accordingly asked to modify their act of cession, so as to enable Congress to lay out the territory into not more than five nor less than three states, as the situation and circumstances of the country might require.<sup>4</sup> This suggestion was complied with.<sup>5</sup>

A cession by South Carolina then followed, of all its claim to lands lying towards the river Mississippi;<sup>6</sup> but no other cessions were made to the United States under the Confederation; those of Georgia and North Carolina having been made after the adoption of the Constitution.<sup>7</sup>

It appears, therefore, that, with the exception of the claims of South Carolina to territory lying due west from that state tow-

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<sup>1</sup> April 19, 1785.

<sup>2</sup> May 20, 1785.

<sup>3</sup> September 14, 1786. Journals, XI. 221-223. The deed of cession, and the act of Connecticut recited in it, do not disclose this reservation. The territory ceded is described by certain lines which include less than the whole claim of Connecticut. It appears from the Journals, under the date of May 22-26, 1786, and from various propositions considered between those dates, that the state of Connecticut claimed to own a larger extent of territory than she proposed to cede; and, by way of compromise, her claim was so far acceded to that Congress agreed to accept of a cession of less than the whole. The reservation embraced about six millions of acres. See Sparks's Washington, IX. 178, note, where it appears that the right of the state to this territory was considered very feeble at the time.

<sup>4</sup> July 9, 1786.

<sup>5</sup> December 30, 1788.

<sup>6</sup> August 9, 1787.

<sup>7</sup> That of North Carolina was made February 25, 1790, and that of Georgia, April 24, 1802.

ards the river Mississippi, the United States, before the 13th of July, 1787, had become possessed of the title to no other territory than that which had been surrendered to them by the states of New York, Virginia, Massachusetts, and Connecticut. The great mass of this territory was that embraced within the cession of Virginia, and lying to the northwest of the river Ohio; and after the whole title to this region, with the exception of some reserved tracts, had become complete in the United States, it was subject to the resolves of 1780 and of 1784. The provisions of the resolve of 1784, however, were soon seen to be inconvenient and inapplicable to the pressing wants of this region. Immediate legislation was plainly demanded for this territory, which could not wait the slow process of forming first temporary and then permanent governments, as had been contemplated by that resolve. Congress had had cast upon it the administration of an empire, exterior to the Confederation, and rapidly filling with people, in which the rights and tenure of property, the preservation of order and tranquillity, and the shaping of its political and social destinies, required instant legislation. This legislation was therefore provided in the celebrated Ordinance for the Government of the Northwestern Territory, enacted July 13, 1787, which was designed to supersede and in terms directly repealed the resolve of 1784. As this fundamental law for a new and unsettled country—at that time a novel undertaking—must always be regarded with interest in every part of the world, and as it lies at the foundation of the civil polity of a large part of these United States, its principles and provisions should be carefully examined.

The territory was, for the purposes of temporary government, constituted one district, subject to be divided into two, as future circumstances might require. An equal distribution of property among the children of persons dying intestate, with a life estate to the widow in one third of the real and personal estate, was made the law of the territory, until it should be altered by its legislature. Persons of full age were empowered to dispose of their estates by a written will, executed in the presence of three witnesses. Real estates were authorized to be conveyed by deed, executed by a person of full age, acknowledged and attested by two witnesses. Both wills and deeds were required to be registered. Personal property was transferable by delivery.

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The civil government of the territory was to consist of executive, legislative, and judicial branches. A governor was to be appointed from time to time by Congress, and to be commissioned for three years, subject to removal; but he was to reside in the district, and to have a freehold estate there in one thousand acres of land, while in the exercise of his office. A secretary was also to be appointed from time to time by Congress, and to be commissioned for four years, subject to removal, but to reside in the district, and to have a freehold estate there in five hundred acres of land, while in the exercise of his office. There was also to be appointed a court of common-law jurisdiction, to consist of three judges, any two of whom should form a court; they were to reside in the district, and to have each a freehold estate there in five hundred acres of land, while in the exercise of their office; their commissions to continue in force during good behavior.

The governor and judges, or a majority of them, were to adopt and publish in the district such laws of the original states, criminal and civil, as might be necessary and best suited to the circumstances of the district, to be in force in the district until the organization of the General Assembly, unless disapproved by Congress, to whom, from time to time, they should be reported; but the legislature, when constituted, were to have authority to alter them as they should think fit.

Magistrates and other civil officers were to be appointed by the governor, previous to the organization of the General Assembly, for the preservation of peace and good order. After the organization of the General Assembly, the powers and duties of magistrates and other civil officers were to be regulated and defined by the legislature, but their appointment was to remain with the governor.

For the prevention of crimes and injuries, the laws to be adopted or made were to have force in all parts of the district, and for the execution of process, criminal and civil, the governor was to make proper divisions of the territory, and to lay out the portions where the Indian titles had been extinguished, from time to time, into counties and townships, subject to future alteration by the legislature.

As soon as there should be five thousand free male inhabitants, of full age, in the district, upon giving proof thereof to the gov-

error, they were to receive authority to elect representatives from their counties or townships, to represent them in the General Assembly. For every five hundred male inhabitants there was to be one representative; and so on progressively the right of representation was to increase, until the number of representatives should amount to twenty-five, after which their numbers and proportions were to be regulated by the legislature. The qualifications of a representative were to be previous citizenship in one of the United States for three years, and residence in the district, or a resident of three years in the district, with a fee-simple estate, in either case, of two hundred acres of land within the district. The qualifications of electors were to be a freehold in fifty acres of land in the district, previous citizenship in one of the United States, and residence in the district, or the like freehold and two years' residence in the district.

The ordinance then proceeded to state certain fundamental articles of compact between the original states and the people and states in the territory, which were to remain unalterable, except by common consent. The first provided for freedom of religious opinion and worship. The second provided for the right to the writ of *habeas corpus*; for trial by jury; for a proportionate representation in the legislature; for judicial proceedings according to the course of the common law; for offences not capital being bailable; for fines being moderate, and punishments not cruel nor unusual; for no man's being deprived of his liberty or property but by the judgment of his peers or the law of the land; for full compensation for property taken or services demanded for the public; and that no law should ever be made, or have force in the territory, that should in any manner whatever interfere with or affect private contracts or engagements, previously formed *bona fide* and without fraud. The third provided for the encouragement of religion and education, for schools, and for good faith towards the rights and property of the Indian tribes. The fourth provided that the territory and the states to be formed therein should forever remain a part of the Confederacy, subject to the constitutional authority of Congress; that the inhabitants should be liable to be taxed proportionately for the public expenses; that the legislature in the territory should never interfere with the primary disposal of the soil by Congress, nor with their regulations for

securing the title to purchasers ; that no tax should be imposed on lands the property of the United States ; that non-resident proprietors should not be taxed more than residents ; and that the navigable waters leading into the Mississippi and St. Lawrence, and the carrying-places between them, should be common highways and forever free.

The fifth provided that there should be formed in the territory not less than three nor more than five states, with certain boundaries ; and that whenever any of the states should contain sixty thousand free inhabitants, such state should be (and might be before) admitted by its delegates into Congress, on an equal footing with the original states in all respects whatever, and should be at liberty to form a permanent constitution and state government, provided it should be republican, and in conformity with these articles of compact.

The sixth provided that there should be neither slavery nor involuntary servitude in the territory, otherwise than in the punishment of crimes ; but that fugitives owing service in other states might be reclaimed.

American legislation has never achieved anything more admirable, as an internal government, than this comprehensive scheme. Its provisions concerning the distribution of property, the principles of civil and religious liberty which it laid at the foundation of the communities since established under its sway, and the efficient and simple organization by which it created the first machinery of civil society, are worthy of all the praise that has ever attended it. It was not a plan devised in the closet upon theoretical principles of abstract fitness. It was a constitution of government drawn by men who understood, from experience, the practical working of the principles which they undertook to embody. Those principles were, it is true, to be applied to a state of society not then formed ; but they were taken from states of society in which they had been tried with success. The equal division of property ; general, not universal suffrage, but a suffrage guarded by some degree of interest in society ; representative government ; the division of the three grand departments of political power ; freedom of religious opinion and worship ; the *habeas corpus*, trial by jury, and the course of the common law ; the right to be bailed for offences not capital, and the pro-

hibition of immoderate fines and cruel or unusual punishments; the great principle of compensation for property or service demanded by the public, and the legislative inviolability of contracts; the encouragement of schools and the means of education—were all taken from the ancient or recent constitutions of states, from which the greater part of the inhabitants of the new territory would necessarily come. A community founded on these principles was predestined to prosperity and happiness.

But it was in the provisions of the ordinance relative to the admission into the Union of the new states to be formed upon this territory that the relation between the existing government of the United States and its great dependency was afterwards found to involve serious difficulties. The Union was at that time a confederacy of thirteen states, originally formed mainly with reference to the exigencies of the war; and, although the Articles of Confederation had been ratified under circumstances which gave to the United States the authority to acquire this property, they had vested in Congress no power to enlarge the Confederacy by the admission of new states. Yet the ordinance undertook to declare that new states should be admitted into the Congress of the United States on an equal footing with the existing states in all respects whatever, without proposing to submit that question to the original parties to the confederacy.

It does not appear from contemporary evidence that this difficulty attracted public attention at the time of the passage of the ordinance. In the year 1787 the Confederation was laboring under far more pressing and alarming defects than the want of strict constitutional power to create new states. Public attention was consequently more engaged with the consideration of evils which affected the prosperity of the original states themselves, than with the destiny of the new communities, or the method by which they were to be brought into the Union. It was not immediately perceived, also, that a property, capable at no distant day of becoming a vast mine of wealth to the United States, as a great and independent revenue, had come under the management of a single body of men, constituted originally without reference to such a trust, and with no declared constitutional provisions for its administration. When, however, the Constitution was in the process of formation, the necessity for provisions



under which Congress could dispose of the public lands, and by which new states could be admitted into the Union, was at once felt and conceded on all sides.<sup>1</sup>

Far more serious difficulties, however, attended the management by the Confederation of the interests of the western country—difficulties which commenced immediately after the Peace, and continued to increase, until the course taken by Congress had nearly lost to the Union the whole of that immense region which now pours its commerce down the Mississippi and its great tributary waters. These difficulties sprang from the inherent weakness of the federal government—from the absolute incapacity of Congress, constituted as it was, to deal wisely, safely, and efficiently with the foreign relations of the country and its internal affairs, under the delicate and critical circumstances in which it was then placed. After the Treaty of Peace, the western settlements, flanked by the dependencies of Great Britain at the north and of Spain at the south, and rapidly filling with a bold, adventurous, and somewhat lawless population, whose ties of connection with the Eastern States were almost sundered by the remoteness of their position and the difficulties of communication, stood upon a pivot where accident might have thrown them out of the Union. This population found themselves seated in a luxuriant and fertile country, capable of a threefold greater production than the states eastward of the Alleghany and Appalachian Mountains, and intersected by natural water communications of the most ample character, all tending to the great highway of the Mississippi. A soil richer than any over which the Anglo-Saxon race had hitherto spread itself upon this continent, in any of its temperate climes; large plains and meadows, capable, without labor, of supporting millions of cattle; and fields destined to vie with the most favored lands on the globe in the production of wheat, were already accumulating upon the banks of their great rivers a weight of produce far beyond the necessities of subsistence, and loudly demanding the means of reaching the markets of the world. The people of the Atlantic states knew little of the resources or situation of this country. They valued it chiefly as a means of paying the

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<sup>1</sup> See Mr. Madison's notes of the Debates in the Confederation. Elliot, V. 128, 157, 190, 211, 376, 381.

public debts by the sale of its lands; but until they were in imminent danger of losing it, from the inefficiency of the national government, they had little idea of the supreme necessity of securing for it an outlet to the sea, if they would preserve it to the Union.

Washington, in the autumn of 1784, after his retirement to Mount Vernon, made a tour into the western country, for the express purpose of ascertaining by what means it could be most effectually bound to the Union. The policy of opening communications eastward by means of the rivers flowing through Virginia to the Atlantic Ocean struck him at once. On his return he addressed a letter to the Governor of Virginia, in which he recommended the appointment of a commission, to make a survey of the whole means of natural water communication between Lake Erie and the tide-waters of Virginia. He does not seem at this time to have considered the navigation of the Mississippi as of great importance; but he thought rather that the opening of that river would have a tendency to separate the Western from the Eastern States.<sup>1</sup> A year later he held a clear opinion that its navigation ought not at present to be made an object by the United States, but that their true policy was to open all the possible avenues between the Atlantic States and the western territory, and that, until this had been done, the obstructions to the use of the Mississippi had better not be removed.<sup>2</sup> Those obstructions, however, involved the hazard of a loss of the territory to which the

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<sup>1</sup> His recommendation contemplated a survey of James River and the Potomac, from tide-water to their respective sources; then to ascertain the best portage between those rivers and the streams capable of improvement which run into the Ohio; then to traverse and survey those streams to their junction with the Ohio; then, passing down the Ohio to the mouth of the Muskingum, to ascend that river to the carrying-place to the Cuyahoga; then down the Cuyahoga to Lake Erie, and thence to Detroit. He also advised a survey of Big Beaver Creek and of the Scioto, and of all the waters east and west of the Ohio which invited attention by their proximity and the ease of land transportation between them and the James and Potomac rivers. "These things being done," he said, "I shall be mistaken if prejudice does not yield to facts, jealousy to candor, and finally, if reason and nature, thus aided, do not dictate what is right and proper to be done" (Writings of Washington, IX. 65). This suggestion was adopted, and a commission appointed.

<sup>2</sup> Writings, IX. 63, 117-119. August 22, 1785.

navigation of that river had already become extremely important. Their nature is, therefore, now to be explained.

The Treaty of Peace with Great Britain recognized, as the southern boundary of the United States, a line drawn from a point where the thirty-first degree of north latitude intersected the river Mississippi, along that parallel due east to the middle of the river Appalachicola; thence along the middle of that river to its junction with the Flint River; thence in a straight line to the head of St. Mary's River; and thence down the middle of that river to the Atlantic Ocean.<sup>1</sup> At the time of the negotiation of this treaty West Florida was in the possession of Spain; and a secret article was executed by the British and American plenipotentiaries, which stipulated that in case Great Britain, at the conclusion of a peace with Spain, should recover or be put in possession of West Florida, the north boundary between that province and the United States should be a line drawn from the mouth of the river Yassous, where it unites with the river Mississippi, due east to the river Appalachicola.<sup>2</sup> The treaty also stipulated that the navigation of the Mississippi, from its source to the ocean, should forever remain free and open to the subjects of Great Britain and the citizens of the United States.<sup>3</sup>

When the treaty came to be ratified and published, in 1784, the Spanish government was already acquainted with this secret article. Justly assuming that no treaty between Great Britain and the United States could settle the boundaries between the territories of the latter power and those of Spain, or give of itself a right to navigate a river passing wholly through their dominions, they immediately caused it to be signified to Congress that, until the limits of Louisiana and the two Floridas should be settled and determined, by an admission on the part of Spain that they had been rightfully described in the treaty with England, they must assert their territorial claims to the exclusive control of the river; and also that the navigation would under no circumstances be conceded, while Spain held the right to its control.<sup>4</sup>

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<sup>1</sup> Article II. Journals, IX. 26.

<sup>2</sup> Executed November 30, 1782. Secret Journals, III. 338.

<sup>3</sup> Article VIII. Journals, IX. 29.

<sup>4</sup> June 25, 1784. Communicated to Congress November 19, 1784. Secret Journals, III. 517, 518.

To accommodate these difficulties, Congress resolved to send Mr. Jay, their secretary of foreign affairs, to Spain; but his departure was prevented by the arrival in the United States of Don Diego Guardoqui, as minister from Spain, charged with the negotiation of a treaty.<sup>1</sup>

Preparatory to this negotiation, the first instruction which Mr. Jay received from Congress was, to insist upon the right of the United States to the territorial boundaries and the free navigation of the Mississippi, as settled by their treaty with Great Britain.<sup>2</sup> Upon this point, however, the Spanish minister was immovable. A long negotiation ensued, in which he evinced entire readiness to make a liberal commercial treaty with the United States, conceding to their trade very important advantages; but at the same time refusing the right to use the Mississippi. Such a treaty was regarded as extremely important to the United States. There was scarcely a single production of this country that could not be advantageously exchanged in the Spanish European ports for gold and silver. The influence of Spain in the Mediterranean, with Portugal, with France, with the States of Barbary, and the trade with her Canaries and the adjacent islands, rendered a commercial alliance with her of the utmost importance. That importance was especially felt by the Eastern and Middle States, whose influence in Congress thus became opposed to the agitation of the subject of opening the Mississippi.<sup>3</sup> Indeed, the prevailing opinion in Congress, at this time, was for not insisting on the right of navigation as a necessary requisite in the treaty with Spain; and there were some important and influential persons in that body ready to agree to the abandonment of the right, rather than defer longer a free and liberal system of trade with a power able to give conditions so advantageous to the United States.<sup>4</sup> The Eastern States

<sup>1</sup> Guardoqui arrived and was recognized July 2, 1785. Secret Journals, III. 563.

<sup>2</sup> August 25, 1785. Secret Journals, III. 585, 586.

<sup>3</sup> See the communication made by Mr. Jay to Congress, August 8, 1786. Secret Journals, IV. 43.

<sup>4</sup> Henry Lee, then in Congress, wrote to Washington on the 3d of July, 1786, as follows: "Your reasoning is perfectly conformable to the prevalent doctrine on that subject in Congress. We are very solicitous to form a treaty with Spain for commercial purposes. Indeed, no nation in Europe can give us conditions so advantageous to our trade as that kingdom. The carrying business they are like ourselves in, and this common source of difficulty in adjusting commercial trea-

considered a commercial treaty with Spain as the best remedy for their distresses, which flowed, as they believed, from the decay of their commerce. Two of the Middle States joined in this opinion. Virginia, on the other hand, opposed all surrender of the right.<sup>1</sup>

In this posture of affairs Mr. Jay proposed to Congress a middle course. Believing, as Washington continued to believe,<sup>2</sup> that

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ties between other nations does not apply to America and Spain. But, my dear General, I do not think you go far enough. Rather than defer longer a free and liberal system of trade with Spain, why not agree to the exclusion of the Mississippi? This exclusion will not, cannot, exist longer than the infancy of the western emigrants. Therefore, to these people what is now done cannot be important. To the Atlantic States it is highly important; for we have no prospect of bringing to a conclusion our negotiations with the court of Madrid but by yielding the navigation of the Mississippi. Their minister here is under positive instructions on that point. In all other arrangements the Spanish monarch will give to the states testimonies of his regard and friendship. And I verily believe that, if the above difficulty should be removed, we should soon experience the advantages which would flow from a connection with Spain." Writings of Washington, IX. 173, note.

<sup>1</sup> Washington's Writings, IX. 205, 206, note.

<sup>2</sup> Washington had not changed his opinion at the time of these negotiations. On the 18th of June, 1786, he wrote to Henry Lee, in answer to his letter above quoted: "The advantages with which the inland navigation of the rivers Potomac and James is pregnant must strike every mind that reasons upon the subject; but there is, I perceive, a diversity of sentiment respecting the benefits and consequences which may flow from the free and immediate use of the Mississippi. My opinion of this matter has been uniformly the same; and no light in which I have been able to consider the subject is likely to change it. It is, neither to relinquish nor to push our claim to this navigation, but in the meanwhile to open *all* the communications which Nature has afforded between the Atlantic States and the western territory, and to encourage the use of them to the utmost. In my judgment, it is matter of very serious concern to the well-being of the former to make it the interest of the latter to trade with them; without which, the ties of consanguinity, which are weakening every day, will soon be no bond, and we shall be no more, a few years hence, to the inhabitants of that country, than the British and Spaniards are at this day; not so much, indeed, because commercial connections, it is well known, lead to others, and, united, are difficult to be broken. These must take place with the Spaniards if the navigation of the Mississippi is opened. Clear I am that it would be for the interest of the western settlers, as low down the Ohio as the Big Kenhawa, and back to the Lakes, to bring their produce through one of the channels I have named; but the way must be cleared,

the navigation of the Mississippi was not at that time very important, and that it would not become so for twenty-five or thirty years, he suggested that the treaty should be limited to that period, and that one of its articles should stipulate that the United States would forbear to use the navigation of the river below their territories to the ocean. It was supposed that such a forbearance, carrying no surrender of the right, would, at the expiration of the treaty, leave the whole subject in as favorable a position as that in which it now stood. Besides, the only alternative to obtaining such an article from Spain was to make war with her, and enforce the opening of the river. The experiment, at least, it was argued, would do no injury, and might produce much good.<sup>1</sup>

These arguments prevailed so far as to cause a change in Mr. Jay's instructions, by a vote, which was deemed by him sufficient to confer authority to obtain such an article as he had suggested, but which was clearly unconstitutional. Seven states against five voted to rescind the instructions of August 25, 1785, by which the secretary had been directed to insist on the right of naviga-

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and made easy and obvious to them, or else the ease with which people glide down streams will give a different bias to their thinking and acting. Whenever the new states become so populous and so extended to the westward as really to need it, there will be no power which can deprive them of the use of the Mississippi. Why, then, should we prematurely urge a matter which is displeasing, and may produce disagreeable consequences, if it is our interest to let it sleep? It may require some management to quiet the restless and impetuous spirits of Kentucky, of whose conduct I am more apprehensive in this business than I am of all the opposition that will be given by the Spaniards." IX. 172, 173.

On the 26th of July of the same year he again wrote to the same gentleman, expressing the same opinions; and on the 31st of October he said that these sentiments "are controverted by only one consideration of weight, and that is, the operation which the occlusion of the river may have on the minds of the western settlers, who will not consider the subject in a relative point of view, or on a comprehensive scale, and may be influenced by the demagogues of the country to acts of extravagance and desperation, under the popular declamation that their interests are sacrificed." In July, 1787, he retained the same views as to the true policy of the different sections of the country interested in this question, but admitted that, from the spirit manifested at the West, it had become a moot point to determine, when every circumstance was brought into view, what was best to be done. IX. 172, 180, 205, 261.

<sup>1</sup> See Mr. Jay's reasoning, Secret Journals, IV. 53, 54.

tion, and not to conclude or sign any treaty until he had communicated it to Congress.<sup>1</sup> Mr. Jay accordingly agreed with the Spanish minister on an article which suspended the use of the Mississippi, without relinquishing the right asserted by the United States.<sup>2</sup>

While these proceedings were going on, and before the vote of seven states in Congress had been obtained in favor of the present suspension of this difficult controversy, an occurrence took place at Natchez which aroused the jealousy of the whole West. A seizure was made there, by the Spanish authorities, of certain American property, which had been carried down the river for shipment or sale at New Orleans.<sup>3</sup> The owner, returning slowly in the autumn to his home, in the western part of North Carolina, by a tedious land journey through Kentucky, detailed everywhere the story of his wrongs and of the loss of his adventure. The news of this seizure, as it circulated up the valley from below, encountered the intelligence coming from the eastward, that Congress proposed to surrender the present use of the Mississippi. Alarm and indignation fired the whole population of the western settlements. They believed themselves to be on the point of being sacrificed to the commercial policy of the Atlantic States; and, feeling that they stood in the relation of colonists to the rest of the Union, they held language not unlike that which the old colonists had held towards England in the earlier days of the great controversy.

They surveyed the magnificent region which they were sub-

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<sup>1</sup> August 29th, 1786. Secret Journals, IV. 109, 110. The states which voted to rescind these instructions were New Hampshire, Massachusetts, Rhode Island, Connecticut, New York, New Jersey, Pennsylvania, and Maryland; Virginia, North and South Carolina, and Georgia, voted not to rescind. Another resolution was carried on the following day (August 30th), by the votes of seven states, instructing the secretary to insist on the territorial limits or boundaries of the United States, as fixed in the Treaty with Great Britain, and not to form any treaty with the Spanish minister unless those boundaries were acknowledged and secured. Ibid., 111-116.

<sup>2</sup> This agreement was made between the 29th of August, the date of the rescinding resolution, and the 6th of October, 1786. See Mr. Jay's communication to Congress under the latter date, Secret Journals, IV. 297-301.

<sup>3</sup> This seizure was made on the 6th of June, 1786. Secret Journals, IV. 325.

duing from the dominion of Nature—the inexhaustible resources of its soil already yielding an abundance, which needed only a free avenue to the ocean to make them rich and prosperous—and they felt that the mighty river which swept by them, with a volume of waters capable of sustaining the navies of the world, had been destined by Providence as a natural channel through which the productions of their imperial valley should be made to swell the commerce of the globe. But the Spaniard was seated at the outlet of this noble stream, sullenly refusing to them all access to the ocean. To him they must pay tribute. To enrich him they must till those luxuriant lands, which gave, by an almost spontaneous production, the largest return which American labor had yet reaped under the industry of its own free hands. Their proud spirits, unaccustomed to restraint, and expanding in a liberty unknown in the older sections of the country, could not brook this vassalage. Into the comprehensive schemes of statesmen, who sought to unite them with the East by a great chain of internal improvements, and thus to blend the interests of the West with the commercial prosperity of the whole country, they were too impatient, and too intent upon the engrossing object of their own immediate advantage, to be able to enter.

What, they exclaimed, could have induced the legislature of the United States, which had been applauded for their assertion and defence of the rights and privileges of the country, so soon to endeavor to subject a large part of their dominion to a slavery worse than that to which Great Britain had presumed to subject any part of hers? To give up to the Spaniards the greatest share of the fruits of their toils—to surrender to them, on their own terms, the produce of that large, rich, and fertile country, and thus to enable them to command the benefits of every foreign market—was an intolerable thought. What advantage, too, would it be to the Atlantic States, when Spain, from the amazing resources of the Mississippi, could undersell them in every part of the world? Did they think by this course of policy to prevent emigration from a barren country, loaded with taxes and impoverished by debts, to the most luxurious and fertile soil within the limits of the Union? The idea was vain and presumptuous. As well might the fishes of the sea be prevented from gathering on a bank that afforded them ample nourishment. The best and



largest part of the United States was not thus to be left uncultivated—a home for savages and wild beasts. Providence had destined it for nobler purposes. It was to be the abode of a great, prosperous, and cultivated people—of Americans in feeling, in rights, in spirit, incapable of becoming the bondmen of Spain, while the rest of their country remained free. Their own strength could achieve for them what the national power refused or was unable to obtain. Twenty thousand effective men, west of the Alleghanies, were ready to rush to the mouth of the Mississippi and drive the Spaniards into the sea. Great Britain stood with open arms to receive them. If not countenanced and succored by the Federal government, their allegiance would be thrown off, and the United States would find too late that they were as ignorant of the great valley of the Mississippi as England was of the Atlantic States when the contest for independence began.<sup>1</sup>

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<sup>1</sup> See the documents laid before Congress, April 13, 1787. Secret Journals, IV. 315–328. On the 30th of January, 1787, Mr. Jefferson thus writes to Mr. Madison, from Paris: “If these transactions give me no uneasiness, I feel very differently at another piece of intelligence, to wit, the possibility that the navigation of the Mississippi may be abandoned to Spain. I never had any interest westward of the Alleghany; and I never will have any. But I have had great opportunities of knowing the character of the people who inhabit that country; and I will venture to say that the act which abandons the navigation of the Mississippi is an act of separation between the eastern and western country. It is a relinquishment of five parts out of eight of the territory of the United States; an abandonment of the fairest subject for the payment of our public debts, and the chaining those debts on our own necks, *in perpetuum*. I have the utmost confidence in the honest intentions of those who concur in this measure; but I lament their want of acquaintance with the character and physical advantages of the people, who, right or wrong, will suppose their interests sacrificed on this occasion to the contrary interests of that part of the Confederacy in possession of present power. If they declare themselves a separate people, we are incapable of a single effort to retain them. Our citizens can never be induced, either as militia or as soldiers, to go there to cut the throats of their own brothers and sons, or, rather, to be themselves the subjects instead of the perpetrators of the parricide. Nor would that country quit the cost of being retained against the will of its inhabitants, could it be done. But it cannot be done. They are able already to rescue the navigation of the Mississippi out of the hands of Spain, and to add New Orleans to their own territory. They will be joined by the inhabitants of Louisiana. This will bring on a war between them and Spain; and that will produce the question with us, whether it will not be worth our while to become parties with them in the war, in order

Such was the feeling that prevailed in the western country as soon as it became known that a treaty was actually pending, by which the right to navigate the Mississippi might be suspended for a quarter of a century. That it should have been accompanied by acts of retaliation and outrage against the property of Spanish subjects was naturally to have been expected. General George Rogers Clarke, pretending to authority from the state of Virginia, undertook to enlist men and establish a garrison at Port St. Vincennes, ostensibly for the protection of the district of Kentucky, then under the jurisdiction of Virginia. He made a seizure there of some Spanish goods for the purpose of clothing and subsisting his men, and sent an officer to the Illinois, to advise the settlers there of the seizures of American property made at Natchez, and to recommend them to retaliate for any outrages the Spaniards might commit in that country.<sup>1</sup>

The executive of Virginia disavowed these acts, as soon as officially informed of them; ordered the parties to be brought to punishment; and sent a formal disclaimer, through their delegates in Congress, to the Spanish minister.<sup>2</sup> Guardoqui was not disturbed. He expected these occurrences, and maintained his ground, refusing to yield the right of navigating the river; and having assented to Mr. Jay's proposal of an article which suspended the use for a period of twenty-five years, he was quite ready to go on and conclude the treaty.

The people of the western country, however, began to form committees of correspondence, in order to unite their counsels and interests.<sup>3</sup> The inhabitants of Kentucky sent a memorial to the General Assembly of Virginia, which induced them to instruct their delegates in Congress to oppose any attempt to surrender the right of the United States to the free use of the Mississippi, as a dishonorable departure from the comprehensive and benevolent feeling that constituted the vital principle of the

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to reunite them with us, and thus correct our error. And were I to permit my forebodings to go one step further, I should predict that the inhabitants of the United States would force their rulers to take the affirmative of that question. I wish I may be mistaken in all these opinions." Jefferson, II. 87.

<sup>1</sup> Secret Journals, IV. 811-813.

<sup>2</sup> February 28th, 1787.

<sup>3</sup> Madison. Elliot's Debates, V. 97.

Confederation, and as provoking the just resentment and reproaches of the western people, whose essential rights and interests would be thereby sacrificed. They also instructed their delegates to urge such negotiations with Spain as would obtain her consent to regulations for the mutual and common use of the river.<sup>1</sup> The members from Virginia, with one exception, concurred in the policy of these instructions,<sup>2</sup> and at first addressed themselves to some conciliatory expedient for obviating the effect of the vote of seven states.

They first represented to Guardoqui that it would be extremely impolitic, both for the United States and Spain, to make any treaty which should have the effect of shutting up the Mississippi. They stated to him that such a treaty could not be enforced; that it would be the means of peopling the western country with increased rapidity, and would tend to a separation of that country from the rest of the Union; that Great Britain would be able to turn the force that would spring up there against Spanish America; and that the result would be the creation of a power in the valley of the Mississippi hostile both to Spain and the United States. These representations produced no impression. The Spanish minister remained firm in the position which he had held from the first, that Spain never would concede the claim of the United States to navigate the river. He answered, that the result of what had been urged was, that Congress could make no treaty at all, and consequently that the trade of the United States must remain liable to be excluded from the ports of Spain.<sup>3</sup>

Foiled in this quarter, the next expedient, for those who felt the necessity of preventing such a treaty as had been contemplated, was to gain time, by transferring the negotiation to Madrid; and Mr. Madison introduced a resolution into Congress for this purpose, which was referred to the secretary for foreign

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<sup>1</sup> These instructions were adopted in November, 1786. Pitkin, II. 207. They were laid before Congress April 19, 1787. Madison. Elliot's Debates, V. 103.

<sup>2</sup> Henry Lee did not approve of this policy. See Washington's Works, IX. 205, note.

<sup>3</sup> See Madison's account of two interviews with Guardoqui, March 13 and 19, 1787. Elliot, V. 98, 100. At the first of these interviews Guardoqui stated that he had had no conference with Mr. Jay since the previous October, and never expected to confer with him again.

Affairs.<sup>1</sup> In a few days the secretary reported against the proposal, and nothing remained for the opponents of the treaty but to attack directly the vote of seven states, under which the secretary had acted in proceeding to adjust with the Spanish minister an article for suspending the right of the United States to the common use of the river below their southern boundary.

The Articles of Confederation expressly declared that the United States should not enter into any treaty or alliance unless nine states in Congress assented to the same.<sup>2</sup> It was very justly contended, therefore, that to proceed to negotiate a treaty authorized by a vote of only seven states would expose the United States to great embarrassment with the other contracting party, since the vote made it certain that the treaty could not be constitutionally ratified; and that the vote itself, having passed in a case requiring the assent of nine states, was not valid for the purpose intended by it. This was not denied; but the advocates of the treaty, by means of a parliamentary rule, resisted the introduction of a resolution to rescind the votes of seven states.<sup>3</sup>

But while this dangerous subject was pending, the affairs of the country had taken a new turn. The convention at Annapolis had been held, in the autumn of 1786, and the convention called to revise the system of the federal government was to meet in May, 1787. It had become sure and plain that a large increase of the powers of the national government was absolutely essential to the continuance of the Union and the prosperity of the states. Every day the situation of the country was becoming more and more critical. No money came into the federal treasury; no respect was paid to the federal authority; and all men saw and admitted that the Confederation was tottering to its fall. Some prominent persons in the Eastern States were suspected of leaning towards monarchy; others openly predicted a partition of

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<sup>1</sup> April 18th, 1787. Madison. Elliot, V. 102. On the next day (April 19th) the instructions of Virginia were laid before Congress, but a motion to refer them also to the secretary was lost, Massachusetts and New York voting against it, and Connecticut being divided (Ibid.). When Mr. Jay's report came under consideration, Mr. Gorham of Massachusetts, according to Mr. Madison, avowed his opinion that the shutting of the Mississippi would be advantageous to the Atlantic States, and wished to see it shut. Ibid., 103.

<sup>2</sup> Article IX.

<sup>3</sup> Madison. Elliot, V. 104, 105.

the states into two or more confederacies; and the distrust which had been created by the project for closing the Mississippi rendered it extremely probable that the western country, at least, would be severed from the Union.

The advocates of that project recoiled, therefore, from the dangers which they had unwittingly created. They saw that the crisis required that harmony and confidence should be studiously cherished, now that the great enterprise of remodelling the government upon a firmer basis was to be attempted. They saw that no new powers could be obtained for the federal system, if the government then existing were to burden itself with an act so certain to be the source of dissension, and so likely to cause a dismemberment of the Confederacy, as the closing of the Mississippi. Like wise and prudent men, therefore, they availed themselves of the expected and probable formation of a new government as a fit occasion for disposing of this question; and after an effort to quiet the apprehensions that had been aroused, the whole matter was postponed, by general consent, to await the action of the Convention of May, 1787.<sup>1</sup> After the Constitution had been formed and adopted, the negotiation was formally referred to the new federal government which was about to be organized, in March, 1789, with a declaration of the opinion of Congress that the free navigation of the river Mississippi was a clear and essential right of the United States, and ought to be so considered and supported.<sup>2</sup>

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<sup>1</sup> Madison. Elliot, V. 104, 105.

<sup>2</sup> September 16, 1788. Secret Journals, IV. 449-454.

## CHAPTER XV.

1783-1787.

DECAY AND FAILURE OF THE CONFEDERATION.—PROGRESS OF OPINION.—STEPS WHICH LED TO THE CONVENTION OF 1787.—INFLUENCE AND EXERTIONS OF HAMILTON.—MEETING OF THE CONVENTION.

THE prominent defects in the Confederation, which have been described in the previous chapters, and which were so rapidly developed after the treaty of 1783, made it manifest that a mere league between independent states, with no power of direct legislation, was not a government for a country like this in a time of peace. They showed that this compact between the states, without any central arbiter to declare or power to enforce the duties which it involved, could not long continue. It had, indeed, answered the great purpose of forming the Union, by bringing the states into relations with each other, the continuance of which was essential to liberty; since nothing could follow the rupture of those relations but the re-establishment of European power, or the native despotism which too often succeeds to civil commotion. By creating a corporate body of confederate states, and by enabling them to go into the money-markets of Europe for the means of carrying on and concluding the war, the Confederation had made the idea and the necessity of a union familiar to the popular mind. But the purposes and objects of the war were far less complex and intricate than the concerns of peace. It was comparatively easy to borrow money; it was another thing to pay it. The federal power, under the Confederation, had little else to do, before the peace, than to administer the concerns of an army in the field, and to attend to the foreign relations of the country, as yet not complicated with questions of commerce. But the vast duties, capable of being discharged by no other power, which came rapidly into existence before the creation of the machinery essential to their performance, exhibited the Confederation in an alarming attitude.

It was found to be destitute of the essence of political sovereignty—the power to compel the individual inhabitants of the country to obey its decrees. It was a system of legislation for states in their corporate and collective capacities, and not for the individuals of whom those states were composed. It could not levy a dollar by way of impost or assessment upon the property of a citizen. It had no means of annulling the action of a state legislature which conflicted with the lawful and constitutional requirements of Congress. It made treaties, and was forced to stand still and see them violated by its own members, for whose benefit they had been made. It owed an enormous debt, and saw itself, year by year, growing more and more unable to liquidate even the annually increasing interest. It stood in the relation of a protector to the principles of republican liberty on which the institutions of the states were founded, and on the first occurrence of danger it stretched forward only a palsied arm, to which no man could look for succor. It undertook to rescue commerce from the blighting effects of foreign policy, and failed to achieve a single conspicuous and important advantage. Every day it lost something of respect abroad and of confidence at home, until all men saw, with Washington, that it had become a great shadow without the substance of a government; while few could even conjecture what was to rise up and supplant it.

Few men could see, amid the decay of empire and the absolute negation of all the vital and essential functions of government, what was to infuse new life into a system so nearly effete. Yet the elements of strength existed in the character of the people; in the assimilation which might be produced, in the lapse of years, by a common language, a common origin, and a common destiny; in the almost boundless resources of the country; and, above all, in the principles of its ancient local institutions, that were capable, to an extent not then conceived, of expansion and application to objects of far greater magnitude than any which they had yet embraced. Through what progress of opinion the people of this country were enabled to grasp and combine these elements into a new system, which could satisfy their wants, we must now inquire.

In this inquiry the student of political history should never fail to observe that the great difficulty of the case, which made it so complex and embarrassing, arose from the separate, sovereign,

and independent existence of the states. The formation of new constitutions, in countries not thus divided, involves only the adaptation of new institutions and forms to the genius, the laws, and the habits of the people. The monarchy of France has, in our day, been first remodelled, and afterwards swept from the face of Europe, to be followed by a republican constitution, which has in its turn been crushed and superseded, and again an empire has been succeeded by a republic. But France is a country that has long been subjected to as complete and powerful a system of centralization as has existed anywhere since the most energetic period of the Roman empire; and whether its institutions of government have or have not needed to be changed, as they have been from time to time, those changes have been made in a country in which an entire political unity has greatly facilitated the operation.

In the United States, on the contrary, a federal government was to be created; and it was to be created for thirteen distinct communities—a government that should not destroy the political sovereignties of the states, and should yet introduce a new sovereignty, formed by means of powers whose surrender by the states, instead of weakening their present strength, would rather develop and increase it. This peculiar difficulty may be constantly traced, amid all the embarrassments of the period in which the fundamental idea of the Constitution was at length evolved.

The progress of opinion and feeling in this country, on the subject of its government, from the peace of 1783 to the year 1787, may properly be introduced by a brief statement of the political tendencies of two principal classes of men. All contemporary evidence assures us that this was a period of great pecuniary distress, arising from the depreciation of the vast quantities of paper money issued by the federal and state governments; from rash speculations; from the uncertain and fluctuating condition of trade; and from the great amount of foreign goods forced into the country as soon as its ports were opened. Naturally, in such a state of things, the debtors were disposed to lean in favor of those systems of government and legislation which would tend to relieve or postpone the payment of their debts; and as such relief could come only from their state governments, they were naturally the friends of state rights and state authority, and were consequently not friendly to any enlargement of the powers of



the federal Constitution. The same causes which led individuals to look to legislation for irregular relief from the burden of their private contracts, led them also to regard public obligations with similar impatience. Opposed to this numerous class of persons were all those who felt the high necessity of preserving inviolate every public and private obligation; who saw that the separate power of the states could not accomplish what was absolutely necessary to sustain both public and private credit; and they were as naturally disposed to look to the resources of the Union for these benefits as the other class were to look in an opposite direction. These tendencies produced, in nearly every state, a struggle, not as between two organized parties, but one that was all along a contest for supremacy between opposite opinions, in which it was at one time doubtful to which side the scale would turn.<sup>1</sup>

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<sup>1</sup> "The war, as you have very justly observed," Washington wrote to James Warren of Massachusetts, in October, 1785, "has terminated most advantageously for America, and a fair field is presented to our view; but I confess to you, my dear sir, that I do not think we possess wisdom or justice enough to cultivate it properly. Illiberality, jealousy, and local policy mix too much in all our public counsels for the good government of the Union. In a word, the Confederation appears to me to be little more than a shadow without the substance, and Congress a nugatory body, their ordinances being little attended to. To me it is a solecism in politics; indeed, it is one of the most extraordinary things in nature, that we should confederate as a nation and yet be afraid to give the rulers of that nation (who are the creatures of our own making, appointed for a limited and short duration, and who are amenable for every action and may be recalled at any moment, and are subject to all the evils which they may be instrumental in producing) sufficient powers to order and direct the affairs of the same. By such policy as this the wheels of government are clogged, and our brightest prospects, and that high expectation which was entertained of us by the wondering world, are turned into astonishment; and, from the high ground on which we stood, we are descending into the vale of confusion and darkness.

"That we have it in our power to become one of the most respectable nations upon earth, admits, in my humble opinion, of no doubt, if we would but pursue a wise, just, and liberal policy towards one another, and keep good faith with the rest of the world. That our resources are ample and increasing, none can deny; but while they are grudgingly applied, or not applied at all, we give a vital stab to public faith, and shall sink, in the eyes of Europe, into contempt.

"It has long been a speculative question among philosophers and wise men, whether foreign commerce is of real advantage to any country; that is, whether the luxury, effeminacy, and corruptions which are introduced along with it are counterbalanced by the convenience and wealth which it brings. But the decis-

The three most important centres of opinion in the Union, before the formation of the Constitution, were Massachusetts, Virginia, and New York.<sup>1</sup> The public proceedings of each of them, in the order of time, on the subject of enlarging the federal powers, are, therefore, important to a just understanding of the course of events which ended in the calling of the Convention.

The legislature of Massachusetts was assembled in the summer of 1785. The proposal of Congress, made to the states in 1784, to grant the power of regulating trade, had been responded to by only four of the states, and the negotiations in Europe were failing from the want of it. Great uneasiness and distress pervaded all the commercial classes, and extended to every other class capable of being affected by a state of things in which a large balance, occasioned by the extravagant importation and use of foreign manufactures, was thrown against the country. The money of the state was rapidly drawn off to meet this balance, which its other exhausted means of remittance could not satisfy. It was impossible for the state to recover its former prosperity while Great Britain and other nations continued the commercial systems which they had adopted. It had become plain to the comprehension of all intelligent persons concerned in trade that nothing could break up those systems so long as the United States were destitute of the same power to regulate their foreign trade, by admitting or excluding foreign vessels and cargoes according to their interests; and it needed only the popular expression of this palpable truth, enforced by a clear and decided executive message, to induce the legislature to act upon it.<sup>2</sup> Governor Bowdoin gave

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ion of this question is of very little importance to us. We have abundant reason to be convinced that the spirit of trade which pervades these states is not to be repressed. It behooves us, then, to establish just principles; and this cannot, any more than other matters of national concern, be done by thirteen heads differently constructed and organized. The necessity, therefore, of a controlling power is obvious; and why it should be withheld is beyond my comprehension." *Writings*, IX. 139-141.

<sup>1</sup> They are named in this order, because it represents the order in which they respectively acted upon the enlargement of the federal powers.

<sup>2</sup> One of the necessary and immediate effects of the Revolution, of course, was the loss of the exclusive commercial advantages which this country had enjoyed with Great Britain and her dependencies; and the prohibitory acts and imposi-

the necessary impulse, and suggested the appointment of special delegates from the states to settle and define the powers with which Congress ought to be invested.<sup>1</sup>

This message caused the adoption of the first resolution passed by the legislature of any state declaring the Articles of Confederation to be inadequate to the great purposes which they were originally designed to effect, and recommending a convention of

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tions, which fell with their full weight on the American trade, after the peace, were particularly disastrous to the trade of Massachusetts. The whale fishery, a business of great importance, had brought into the province, before the war, 172,000 guineas per annum, giving employment to American seamen, and not requiring the use of any foreign materials, except a small quantity of cordage. A duty was now laid on whale oil in England of £18 per tun. In addition to the loss thus sustained, the exportation of lumber and provisions in American bottoms to the West Indies was entirely prohibited. Another great inconvenience, which came in fact to be intolerable, was the vast influx of British goods, consigned to English factors for sale, depriving the native merchants, manufacturers, and artisans of the market. At the same time the revenue of the state, derived from impost and excise duties and a tax on auctions of one per cent., fell short of the annual interest on the private debt of the state £30,000 (currency) per annum, and a tax of £20,000 (currency) was computed to be necessary to cancel the debt, principal and interest, in fifteen years, and pay the ordinary charges of the government. Besides this, the state's proportion of the federal debt was to be provided for. It was in this state of things that two remarkable popular meetings were held in Boston, in the spring of 1785, to act upon the subject of trade and navigation, and to call the attention of Congress to the necessity for a national regulation of commerce. The first was a meeting of the merchants and tradesmen, convened at Faneuil Hall on the 18th of April. They appointed a committee to draft a petition to Congress, representing the embarrassments under which the trade was laboring, and took measures to cause the legislature to call the attention of the delegation in Congress to the importance of immediate action upon the subject. They also established a committee of correspondence with the merchants in the other seaports of the United States, to induce a similar action; and they entered into a pledge not to purchase any goods of the British merchants and factors residing in Boston, who had made very heavy importations, which tended to drain the specie of the state. The other meeting was an assembly of the artisans and mechanics, held at the Green Dragon Tavern, on the 28th of April, at which similar resolutions were adopted. It is quite apparent, from these proceedings, that all branches of industry were threatened with ruin; and in the efforts to counteract the effects of the great influx of foreign commodities, we trace the first movements of a popular nature towards a national control over commerce.

<sup>1</sup> Governor Bowdoin's first Message to the Legislature, May 31, 1785.

delegates from all the states, for the purpose of revising them, and reporting to Congress how far it might be necessary to alter or enlarge the powers of the Federal Union, in order to secure and perpetuate its primary objects. Congress was requested by these resolves to recommend such a convention. A letter, urging the importance of the subject, was addressed by the governor of Massachusetts to the president of Congress, and another to the executive of each of the other states. The resolves were also enclosed to the delegates of the state in Congress, with instructions to lay them before that body at the earliest opportunity, and to make every exertion to carry them into effect.<sup>1</sup>

They were, however, never presented to Congress. That body was wholly unprepared for such a step, and the delegation of Massachusetts were entirely opposed to it, as premature. It had been all along the policy of Congress to obtain only a grant of temporary power over commerce, and to this policy they were committed by their proposition, now pending with the legislatures of the states, and by the instructions of the commissioners whom they had sent to Europe to negotiate commercial treaties. The prevalent idea in Congress was, that at the expiration of fifteen years—the period for which they had asked the states to grant them power over commerce—a new commercial epoch would commence, when the states would have a more clear and comprehensive view of their interests, and of the best means for promoting them, whether by treaties abroad, or by the delegation and exercise of greater power at home. It was argued, also, that the most safe and practicable course was, to grant temporary power in the first instance, and to leave the question of its permanent adoption as a part of the Confederation to depend on its beneficial effects. Another objection, which afterwards caused serious difficulty, was that the Articles of Confederation contained no provision for their amendment by a convention, but that changes should originate in Congress and be confirmed by the state legislatures, and that, if the report of a convention should not be adopted by Congress, great mischiefs would follow.

But a deep-seated jealousy in Congress of the radical changes likely to be made in the system of government lay at the founda-

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<sup>1</sup> July 1, 1785.

tion of these objections. There was an apprehension that the Convention might be composed of persons favorable to an aristocratic system; or that, even if the members were altogether republican in their views, there would be great danger of a report which would propose an entire remodelling of the government. The delegation from Massachusetts, influenced by these fears, retained the resolutions of the state for two months, and then replied to the governor's letter, assigning these as their reasons for not complying with the directions given to them.<sup>1</sup> The legislature of Massachusetts thereupon annulled their resolutions recommending a Convention.<sup>2</sup>

It is manifest from this occurrence that Congress in 1785 were no more in a condition to take the lead and conduct the country to a revision of the Federal Constitution than they were in 1783, when Hamilton wished to have a declaration made of its defects, and found it impracticable. There were seldom present more than five-and-twenty members; and at the time when Massachusetts proposed to call upon them to act upon this momentous subject the whole assembly embraced as little eminent talent as had ever appeared in it. They were not well placed to observe that something more than "the declamation of designing men" was at work, loosening the foundations of the system which they were administering.<sup>3</sup> They saw some of its present inconveniences; but they did not see how rapidly it was losing the confidence of the country, of which the following year was destined to deprive it altogether.

Before the year 1785 had closed, however, Virginia was pre-

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<sup>1</sup> The delegation at that time consisted of Elbridge Gerry, Samuel Holten, and Rufus King. Their "Reasons assigned for suspending the delivery to Congress of the governor's letter for revising and altering the Confederation" may be found in the *Life of Hamilton*, II. 353. See also *Boston Magazine* for 1785, p. 475.

<sup>2</sup> November 25, 1785.

<sup>3</sup> Letter of Messrs. Gerry, Holten, and King, delegates in Congress, to the governor of Massachusetts, assigning reasons for suspending the delivery of his letter to Congress, dated September 3, 1785. *Life of Hamilton*, II. 353, 357. "We are apprehensive," said they, "and it is our duty to declare it, that such a measure would produce throughout the Union an exertion of the friends of an aristocracy to send members who would promote a change of government; and we can form some judgment of the plan which such members would report to Congress. But should the members be altogether republican, *such have been the*

paring to give the weight of her influence to the advancing cause of reform.

A proposition was introduced into the House of Delegates of Virginia to instruct the delegates of the state in Congress to move a recommendation to all the states to authorize Congress to collect a revenue by means of duties uniform throughout the United States, for a period of thirteen years.<sup>1</sup> The absolute necessity for such a system was generally admitted; but, as in Massachusetts, the opinions of the members were divided between a permanent grant of power and a grant for a limited term. The advocates of the limitation, arguing that the utility of the measure ought to be tested by experiment, contended that a temporary grant of commercial powers might be and would be renewed from time to time, if experience should prove its efficacy. They forgot that the other powers granted to the Union, on which its whole fabric rested, were perpetual and irrevocable; and that the first sacrifices of sovereignty made by the states had been the result of circumstances which imperatively demanded the surrender, just as the situation of the country now demanded a similar surrender of an irrevocable power over commerce. The proposal to make this grant temporary only was a proposal to engraft an anomaly upon the other powers of the Confederacy, with very little prospect of its future renewal; for the caprice, the jealousy, and the diversity of interests of the different states were obstacles which the scheme of a temporary grant could only evade for the present, leaving them still in existence when the period of the grant should expire. But the arguments in favor of this scheme prevailed, and the friends of the more enlarged and liberal system, believing that a temporary measure would stand afterwards in the way of a permanent one, and would confirm the policy of other countries founded on the jealousies of the states, were glad to

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*declamations of designing men* against the Confederation generally, against the rotation of members, which, perhaps, is the best check to corruption, and against the mode of altering the Confederation by the unanimous consent of the legislatures, which effectually prevents innovations in the articles by intrigue or surprise, that we think there is great danger of a report which would invest Congress with powers that the honorable legislature have not the most distant intention to delegate."

<sup>1</sup> November 30th, 1785.

allow the subject to subside, until a new event opened the prospect for a more efficient plan.<sup>1</sup>

The citizens of Virginia and Maryland, directly interested in the navigation of the rivers Potomac and Pocomoke and of the bay of Chesapeake, had long been embarrassed by the conflicting rights and regulations of their respective states, and in the spring of 1785 an effort at accommodation was made, by the appointment of commissioners on the part of each state to form a compact between them for the regulation of the trade upon those waters. These commissioners assembled at Alexandria in March, and while there made a visit at Mount Vernon, where a further scheme was concerted for the establishment of harmonious commercial regulations between the two states.<sup>2</sup> This plan contemplated the appointment of other commissioners, having power to make arrangements, with the assent of Congress, for maintaining a naval force in the Chesapeake, and also for establishing a tariff of duties on imports, to be enacted by the legislatures of both states. A report embracing this recommendation was accordingly made by the Alexandria commissioners to their respective governments. In the legislature of Virginia this report was received while the

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<sup>1</sup> The resolution introduced on the 30th of November was agreed to in the Delegates, but before it was carried up to the Senate it was reconsidered and laid upon the table. Elliot's Debates, I. 114, 115. Letter of Mr. Madison to Washington, of December 9, 1785, Washington's Works, IX. 508.

<sup>2</sup> What direct agency Washington had in suggesting or promoting this scheme does not appear, although it seems to have originated, or to have been agreed upon, at his house. His published correspondence contains no mention of the visit of the commissioners, but Chief-Justice Marshall states that such a visit was made, and in this statement he is followed by Mr. Sparks (Marshall, V. 90; Sparks, I. 428). Mr. Madison, writing to Washington in December, 1785, refers to "the proposed appointment of commissioners for Virginia and Maryland, *concerted at Mount Vernon*, for keeping up harmony in the commercial regulations of the two states," and says that the meeting of commissioners from all the states, which had then been proposed, "seems naturally to grow out of it." Washington's Writings, IX. 509.

That Washington foresaw that the plan agreed upon at his house in March would lead to a general assembly of representatives of all the states seems altogether probable, from the opinions which he entertained and expressed to his correspondents, during that summer, upon the subject of conferring adequate commercial powers upon Congress. See his Letters to Mr. McHenry and Mr. Madison of August 22d and November 30th. Writings, IX. 121, 145.

proposition for granting temporary commercial powers to Congress was under consideration; and it was immediately followed by a resolution directing that part of the plan which respected duties on imports to be communicated to all the states, with an invitation to send deputies to the meeting. In a few days afterwards the celebrated resolution of Virginia, which led the way to the convention at Annapolis, was adopted by the legislature, directing the appointment of commissioners to meet with the deputies of all the other states who might be appointed for the same purpose, to consider the whole subject of the commerce of the United States.<sup>1</sup> The circular letter which transmitted this resolution to the several states proposed that Annapolis, in the state of Maryland, should be the place, and that the following September should be the time of meeting.

The fate of this measure now turned principally upon the action of the state of New York. The power of levying a national impost, proposed in the revenue system of 1783, had been steadily withheld from Congress by the legislature of that state. Ever since the peace the state had been divided between two parties—the friends of adequate powers in Congress, and the adherents of state sovereignty; and the belief that the commercial advantage of the state depended upon retaining the power to collect their own revenues had all along given to the latter an ascendancy in the legislature. In 1784 they established a custom-house and a revenue system of their own. In 1785 a proposition to grant the

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<sup>1</sup> This resolution, passed January 21, 1786, was in these words: "*Resolved*, That Edmund Randolph, James Madison, Jr., Walter Jones, St. George Tucker, Meriweather Smith, David Ross, William Ronald, and George Mason, Esquires, be appointed commissioners, who, or any five of whom, shall meet such commissioners as may be appointed by the other states in the Union, at a time and place to be agreed on, to take into consideration the trade of the United States; to examine the relative situation and trade of the said states; to consider how far a uniform system in their commercial regulations may be necessary to their common interest and their permanent harmony; and to report to the several states such an act relative to this great object as, when unanimously ratified by them, will enable the United States in Congress assembled effectually to provide for the same; that the said commissioners shall immediately transmit to the several states copies of the preceding resolution, with a circular letter respecting their concurrence therein, and proposing a time and place for the meeting aforesaid."



required powers to Congress was lost in the senate, and in 1786 it became necessary for Congress to bring this question to a final issue. Three other states, as we have seen, stood in the same category with New York, having decided in favor of no part of the plan which Congress had so long and so repeatedly urged upon their adoption.<sup>1</sup> Declaring, therefore, that the crisis had arrived when the people of the United States, by whose will and for whose benefit the federal government was instituted, must decide whether they would support their work as a nation by maintaining the public faith at home and abroad, or whether, for want of a timely exertion in establishing a general revenue system, and thereby giving strength to the Confederacy, they would hazard the existence of the Union and the privileges for which they had contended—Congress left the responsibility of the decision with the legislatures of the states.<sup>2</sup>

It was now that the influence of Hamilton upon the destinies of this country began to be favored by the events which had brought its affairs to the present juncture. To his sagacious and

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<sup>1</sup> Rhode Island, Maryland, and Georgia.

<sup>2</sup> "The committee," said the Report, "have thought it their duty candidly to examine the principles of this system, and to discover, if possible, the reasons which have prevented its adoption; they cannot learn that any member of the Confederacy has stated or brought forward any objections against it, and the result of their impartial inquiries into the nature and operation of the plan has been a clear and decided opinion that the system itself is more free from well-founded exceptions, and is better calculated to receive the approbation of the several states, than any other that the wisdom of Congress can devise. In the course of this inquiry it most clearly appeared that the requisitions of Congress for eight years past have been so irregular in their operation, so uncertain in their collection, and so evidently unproductive, that a reliance on them in future as a source from whence moneys are to be drawn to discharge the engagements of the Confederacy, definite as they are in time and amount, would be not less dishonorable to the understandings of those who entertain such confidence, than it would be dangerous to the welfare and peace of the Union. The committee are, therefore, seriously impressed with the indispensable obligation that Congress are under of representing to the immediate and impartial consideration of the several states the utter impossibility of maintaining and preserving the faith of the federal government by temporary requisitions on the states, and the consequent necessity of an early and complete accession of all the states to the revenue system of the 18th of April, 1783." Journals of Congress, XI. 35, 36. February 15, 1786.

watchful forecast the proposal of a commercial convention, emanating from Virginia, presented the opportunity which he had long desired to effect an entire change in the system of the federal government; while, at the same time, the final appeal made by Congress for the establishment of the revenue system gave him an occasion to bring the state of New York into the movement which had been originated by Virginia. He determined that this system should be again presented to the legislature for distinct approval or rejection, and that, if it should be rejected, the state should still send a representation to the Convention at Annapolis. He, therefore, caused the revenue system, as proposed by Congress, to be again brought before the legislature, where it was again rejected; and he and his friends then threw their whole influence in favor of the appointment of commissioners to attend the commercial convention, and succeeded, Hamilton himself being appointed one of them.<sup>1</sup>

This great step having been taken, the course of the state of New York upon the revenue system of 1783, which brought her at length to an open controversy with Congress, tended strongly to aid the plans of Hamilton, and finally gave him the ascendancy in the state itself. The legislature, in May, 1786, passed an act for granting imposts and duties to the United States, and soon afterwards adjourned. It was immediately pronounced by Congress not to be a compliance with their recommendation, and the governor was earnestly requested to reassemble the legislature. This he declined to do, upon the ground of a want of constitutional power. Congress again urged the summoning of the legislature, for the purpose of granting the system of impost in such a manner as to enable them to carry it into effect, and the governor again refused.<sup>2</sup>

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<sup>1</sup> Life of Hamilton, II. 374, 375.

<sup>2</sup> The legislature of New York were willing to grant the duties to Congress, but insisted upon reserving the power of levying and collecting them; and, instead of making the collectors amenable to and removable by Congress, they made them removable by the state, on conviction for default or neglect of duty, in the state courts. This was a material departure from the plan recommended by Congress, and was entirely inconsistent with the grants already made by several of the states. See the Report and proceedings in Congress on the New York Act, July 27-August 23, 1786. Journals, XI. 153, 184, 197, 200.

Arrived at Annapolis, Hamilton found there the representatives of five states only.<sup>1</sup> He had come with the determination that the Convention should lay before the country the whole subject of the condition of the states and the want of an efficient federal government. But the avowed purpose of the meeting was solely to consider the means of establishing a uniform system of commercial regulations, and not to reform the existing government of the Union. New Jersey alone, of the five states represented, had empowered her commissioners to consider of "other important matters," in addition to the subject of commercial regulations. Four other states had appointed commissioners, none of whom had attended, and the four remaining states had made no appointment at all.<sup>2</sup>

Under these circumstances it was certainly a matter of great delicacy for the commissioners of five states only to pass upon the general situation of the Union, and to pronounce its existing government defective and insufficient. Hamilton, however, felt that this opportunity, once lost, might never occur again; and, although willing to waive his original purpose of a full exposition of the defects of the Confederation, he did not deem it expedient that the convention should adjourn without proposing to the country some measure that would lead to the necessary reforms. He modified his original plan, therefore, and laid before his colleagues a report which formally proposed to the several states the assembling of a general convention, to take into consideration the situation of the United States.

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<sup>1</sup> New York was represented by Alexander Hamilton and Egbert Benson; New Jersey by Abraham Clark, William C. Houston, and James Schureman; Pennsylvania by Tench Coxe; Delaware by George Read, John Dickinson, and Richard Bassett; Virginia by Edmund Randolph (Governor), James Madison, Jr., and St. George Tucker.

<sup>2</sup> General Knox, writing to Washington, under date of January 14th, 1787, says: "You ask what prevented the Eastern States from attending the September meeting at Annapolis. It is difficult to give a precise answer to this question. Perhaps torpidity in New Hampshire, faction and heats about their paper money in Rhode Island, and jealousy in Connecticut. Massachusetts had chosen delegates to attend, who did not decline until very late, and the finding of other persons to supply their places was attended with delay, so that the convention had broken up by the time the new-chosen delegates had reached Philadelphia." Writings of Washington, IX. 513.

In this document it was declared that the regulation of trade, which had been made the object of the meeting at Annapolis, could not be effected alone, for the power of regulating commerce would enter so far into the general system of the federal government that it would require a corresponding adjustment of the other parts of the system. That the system of the general government was seriously defective; that those defects were likely to be found greater on a close inspection; that they were the cause of the embarrassments which marked the state of public affairs, foreign and domestic; and that some mode by which they could be peaceably supplied was imperatively demanded by the public necessities, were propositions which the country was then prepared to receive. A convention of deputies from the different states, for the special and sole purpose of investigating the defects of the national government, seemed to be the course entitled to preference over all others.<sup>1</sup>

It was indeed the only method by which the object of the great statesman who drafted this report could have been reached. The Articles of Confederation had provided that they should be inviolably observed by every state; that the Union should be perpetual; and that no alteration should be made in any of the Articles, unless agreed to in a Congress of the United States, and confirmed by the legislature of every state.<sup>2</sup> To have left the whole subject to the action of Congress would have insured, at most, only a change in some of the features of the existing government, instead of the great reform which Hamilton believed to be essential—the substitution of a totally different system. At the same time the co-operation and assent of Congress were necessary to the success of the plan of a convention, in order that it might not seem to be a violent departure from the provisions of the Articles of Confederation, and also for the sake of their influence with the states. The proposal of the report was therefore cautious. It did not suggest the summoning of a convention to frame a new constitution of government, but “to devise such further provisions as might appear to be necessary to render the constitution of the federal government adequate to the exigencies of the Union.” It

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<sup>1</sup> Report of the Annapolis Convention, Elliot's Debates, I. 116; Hamilton's Works, II. 336.

<sup>2</sup> Article XIII.

proposed, also, that whatever reform should be agreed on by the Convention should be reported to Congress, and, when agreed to by them, should be confirmed by the *legislatures* of all the states. In this manner the proposal avoided any seeming violence to the Articles of Confederation, and suggested the Convention as a body to prepare for the use of Congress a plan to be adopted by them for submission to the states.<sup>1</sup>

At the same time Hamilton undoubtedly contemplated more than any amendment of the existing Constitution. In 1780 he had analyzed the defects of the general government, sketched the outline of a Federal Constitution, and suggested the calling of a convention to frame such a system.<sup>2</sup> The idea of such a convention was undoubtedly entertained, by many persons, before the meeting at Annapolis. It had been recommended by the legislature of New York in 1782, and by that of Massachusetts in 1785. But Hamilton had foreseen its necessity in 1780, more than seven years before the meeting at Annapolis; and, although he may not have been the author of the first public proposal of such a measure, his private correspondence contains the first suggestion of it, and proves that he had conceived the main features of the Constitution of the United States, even before the Confederation itself was established.<sup>3</sup>

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<sup>1</sup> Report, *ut supra*.

<sup>2</sup> See his letter to James Duane, written in 1780, *Life*, I. 284-305.

<sup>3</sup> *Ibid.* The first public proposal of a continental convention is assigned by Mr. Madison to one Pelatiah Webster, whom he calls "an able, though not conspicuous citizen," and who made this suggestion in a pamphlet published in May, 1781. Recent researches have not added to our knowledge of this writer. In the summer of 1782 the legislature of New York, under the suggestion of Hamilton, passed resolutions recommending such a convention. On the 1st of April, 1783, Hamilton, in a debate in Congress, expressed his desire to see a general convention take place. In 1784 the measure was a good deal talked of among the members of Congress, and in the winter of 1784-85, Noah Webster, an eminent political writer in Connecticut, suggested "a new system of government, which should act, not on the states, but directly on individuals, and vest in Congress full power to carry its laws into effect." In 1786 the subject was again talked of among members of Congress, before the meeting at Annapolis. (*Madison. Elliot*, V. 117, 118.) But Hamilton's letter to James Duane, in 1780, although not published at the time, was of course earlier than any of these suggestions. In that letter, after showing that the fundamental defect of the then existing system was a want of power in Congress, he thus analyzes in advance

The recommendation of the Annapolis commissioners was variously received. In the legislature of Virginia it met with a cordial approval, and an act was passed during the autumn to provide

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the Articles of Confederation, which had not then taken effect: "But the Confederation itself is defective, and requires to be altered. It is neither fit for war nor peace. The idea of an uncontrollable sovereignty, in each state, over its internal police, will defeat the other powers given to Congress, and make our Union feeble and precarious. There are instances without number where acts necessary for the general good, and which rise out of the powers given to Congress, must interfere with the internal police of the states; and there are as many instances in which the particular states, by arrangements of internal police, can effectually, though indirectly, counteract the arrangements of Congress. You have already had examples of this, for which I refer to your own memory. The Confederation gives the states, individually, too much influence in the affairs of the army; they should have nothing to do with it. The entire foundation and disposal of our military forces ought to belong to Congress. It is an essential element of the Union; and it ought to be the policy of Congress to destroy all ideas of state attachment in the army, and make it look up wholly to them. For this purpose all appointments, promotions, and provisions whatsoever ought to be made by them. It may be apprehended that this may be dangerous to liberty. But nothing appears more evident to me than that we run much greater risk of having a weak and disunited federal government, than one which will be able to usurp upon the rights of the people. Already some of the lines of the army would obey their states in opposition to Congress, notwithstanding the pains we have taken to preserve the unity of the army. If anything would hinder this, it would be the personal influence of the general—a melancholy and mortifying consideration. The forms of our state constitutions must always give them great weight in our affairs, and will make it too difficult to blind them to the pursuit of a common interest, too easy to oppose what they do not like, and to form partial combinations subversive of the general one. There is a wide difference between our situation and that of an empire under one simple form of government, distributed into counties, provinces, or districts which have no legislatures, but merely magistratical bodies to execute the laws of a common sovereign. There the danger is that the sovereign will have too much power, and oppress the parts of which it is composed. In our case, that of an empire composed of confederate states, each with a government completely organized within itself, having all the means to draw its subjects to a close dependence on itself, the danger is directly the reverse. It is, that the common sovereign will not have power sufficient to unite the different members together, and direct the common forces to the interest and happiness of the whole. . . . The Confederation, too, gives the power of the purse too entirely to the state legislatures. It should provide perpetual funds in the disposal of Congress, by a land-tax, poll-tax, or the like. All imposts upon commerce ought to be laid by Congress,

for the appointment of delegates to the proposed convention. In Congress it was received at first with little favor. Doubts were entertained there whether any changes in the federal government

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and appropriated to their use; for without certain revenues a government can have no power; that power which holds the purse-strings absolutely must rule. This seems to be a medium which, without making Congress altogether independent, will tend to give reality to its authority. Another defect in our system is, want of method and energy in the administration. This has partly resulted from the other defect; but in a great degree from prejudice and the want of a proper executive. Congress have kept the power too much in their own hands, and have meddled too much with details of every sort. Congress is properly a deliberative corps, and it forgets itself when it attempts to play the executive. It is impossible that a body, numerous as it is, constantly fluctuating, can ever act with sufficient decision, or with system. Two thirds of the members, one half the time, cannot know what has gone before them, or what connection the subject in hand has to what has been transacted on former occasions. The members who have been more permanent will only give information that promotes the side they espouse, in the present case, and will as often mislead as enlighten. The variety of business must distract, and the proneness of every assembly to debate must at all times delay. Lastly, Congress, convinced of these inconveniences, have gone into the measure of appointing boards. But this is, in my opinion, a bad plan. A single man, in each department of the administration, would be greatly preferable. It would give us a chance of more knowledge, more activity, more responsibility, and, of course, more zeal and attention. Boards partake of the inconveniences of larger assemblies; their decisions are slower, their energy less, their responsibility more diffused. They will not have the same abilities and knowledge as an administration by single men. Men of the first pretensions will not so readily engage in them, because they will be less conspicuous, of less importance, have less opportunity of distinguishing themselves. The members of boards will take less pains to inform themselves and arrive at eminence, because they have fewer motives to do it. All these reasons conspire to give a preference to the plan of vesting the great executive departments of the state in the hands of individuals. As these men will be, of course, at all times under the direction of Congress, we shall blend the advantages of a monarchy in one constitution. . . . I shall now propose the remedies which appear to me applicable to our circumstances, and necessary to extricate our affairs from their present deplorable situation. The first step must be to give Congress powers competent to the public exigencies. This may happen in two ways: one, by resuming and exercising the discretionary powers I suppose to have been originally vested in them for the safety of the states, and resting their conduct on the candor of their countrymen and the necessity of the conjuncture; the other, *by calling immediately a convention of all the states*, with full authority to conclude finally upon a general confederation, stating to them beforehand ex-

could be constitutionally made, unless they were to originate in Congress and were then to be adopted by the legislatures of the states, pursuant to the mode provided by the Articles of Confederation. The legislatures, it was argued, could not adopt any scheme that might be proposed by a convention; and if it were submitted to the people, it was not only doubtful what degree of assent on their part would make it valid, but it was also doubtful whether they could change the federal system by their own direct action. To these difficulties was to be added the further hazard, that, if the report of the convention should be made to

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explicitly the evils arising from a want of power in Congress, and the impossibility of supporting the contest on its present footing, that the delegates may come possessed of proper sentiments, as well as proper authority, to give efficacy to the meeting. *Their commission should include a right of vesting Congress with the whole or a proportion of the unoccupied lands, to be employed for the purpose of raising a revenue, reserving the jurisdiction to the states by whom they are granted.* The Confederation, in my opinion, should give Congress a complete sovereignty; except as to that part of internal police which relates to the rights of property and life among individuals, and to raising money by internal taxes. It is necessary that everything belonging to this should be regulated by the state legislatures. Congress should have complete sovereignty in all that relates to war, peace, trade, finance; and to the management of foreign affairs; the right of declaring war, of raising armies, officering, paying them, directing their motions in every respect; of equipping fleets, and doing the same with them; of building fortifications, arsenals, magazines, etc.; of making peace on such conditions as they think proper; of regulating trade, determining with what countries it shall be carried on; granting indulgences; laying prohibitions on all the articles of export or import; imposing duties, granting bounties and premiums for raising, exporting, or importing; and applying to their own use the product of these duties, only giving credit to the states on whom they are raised in the general account of revenues and expense; instituting admiralty courts, etc.; of coining money, establishing banks on such terms, and with such privileges, as they think proper; appropriating funds, and doing whatever else relates to the operations of finance; transacting everything with foreign nations; making alliances offensive and defensive, and treaties of commerce, etc. . . . The second step I would recommend is, that Congress should instantly appoint the following great officers of state: a secretary for foreign affairs; a president of war; a president of marine; a financier; a president of trade. . . . These officers should have nearly the same powers and functions as those in France analogous to them, and each should be chief in his department, with subordinate boards, composed of assistants, clerks, etc., to execute his orders." *Life of Hamilton*, I. 284-305.



Congress, as proposed, they might not finally adopt it, and if it should be rejected, that fatal consequences would ensue.<sup>1</sup>

The report of the Annapolis commissioners was, however, taken into consideration; and in the course of the following winter a report upon it was made in Congress, which conceded the fact that the Confederation required amendments, and that the proposed Convention was the most eligible mode of effecting them.<sup>2</sup> But this report had to encounter the objection, entertained by many members, that the measure proposed would tend to weaken the federal authority, by lending the sanction of Congress to an extra-constitutional proceeding. Others considered that a more summary mode of proceeding was advisable, in the form of a direct appeal to the people of every state to institute state conventions, which should choose delegates to a general convention, to revise and amend, or change, the federal system, and to publish the new constitution for general observance, without any reference to the states for their acceptance or confirmation.<sup>3</sup> There were still others who preferred that Congress should take up the defects of the existing system, point them out to the legislatures of the states, and recommend certain distinct alterations to be adopted by them.<sup>4</sup>

It was no doubt true that a convention originating with the state legislatures was not a mode pointed out by the Articles of Confederation for effecting amendments to that instrument. But it was equally true that the mere amendment of that instrument was not what the critical situation of the country required. On the other hand, a convention originating with the people of the

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<sup>1</sup> Abstract of an Address made to the Legislature of Massachusetts, by the Hon. Rufus King, in October, 1786. *Boston Magazine* for the year 1786, p. 406.

<sup>2</sup> Mr. Madison's Notes of Debates in the Congress of the Confederation. Elliot, V. 96.

<sup>3</sup> This was the opinion of Mr. Jay. He thought that no alterations should be attempted, unless deduced from the only source of just authority, the people. He seems to have considered that, if the people of the states, acting through their primary conventions, were to send delegates to a general convention, with authority to alter the Articles of Confederation, the new system would rest upon the authority of the people, without further sanction. See his letter to Washington, of date January 7, 1787. *Writings of Washington*, IX. 510.

<sup>4</sup> Letter of General Knox to Washington, January 14, 1787. *Writings of Washington*, IX. 513.

states would undoubtedly rest upon the authority of the people, in its inception; but, if the system which it might frame were to go into operation without first being adopted by the people, it would as certainly want the true basis of their consent. These difficulties were felt in and out of Congress. But it does not seem to have occurred to those who raised them that the source from which the Convention should derive its powers to frame and recommend a new system of government was of far less consequence than that the mode in which the system recommended should be adopted might be one that would give it the full sanction and authority of the people themselves. A constitution might be framed and recommended by any body of individuals, whether instituted by the legislatures or the people of the states; but if adopted and ordained by the people of the states in their corporate capacities it would rest on one basis, and if adopted and ordained by the people of the states acting upon it directly and primarily it would obviously rest upon another, a different, and a higher authority.

The latter mode was not contemplated by Congress when they acted upon the recommendation of the Annapolis commissioners. Accustomed to no other idea of a union than that formed by the states in their corporate capacities as distinct and sovereign communities; belonging to a body constituted by the states, and therefore officially related rather to the governments than to the people of the states; and entertaining a becoming and salutary fear of departing from a constitution which they had been appointed to administer—the members of the Congress of 1786–87 were not likely to go beyond the Annapolis recommendation, which in fact proposed that the new system should be confirmed by the legislatures of the states.

But the course of events tended to a different result—to an actual, although a peaceable revolution, by the quiet substitution of a new government in place of the old one, and resting upon an entirely different basis. While Congress were debating the objections to a convention, the necessity for action became every day more stringent. The insurrection in Massachusetts, which had followed the meeting of the commissioners at Annapolis and had reached a dangerous crisis when their report was before Congress, had alarmed the people of the older states by the perils

of an anarchy with which the existing national government would be obviously unable to cope. The peril of losing the navigation of the Mississippi, and with it the western settlements, through the inefficiency of Congress, was also at that moment impending; while, at the same time, the commerce of the country was nearly annihilated by a course of policy pursued by England, which Congress was utterly unable to encounter. Under these dangers and embarrassments a state of public opinion was rapidly developed, in the winter of 1787, which drove Congress to action. The objections to the proposal before them yielded gradually to the stern requirements of necessity, and a convention was at last accepted, not merely as the best, but as the only practicable mode of reaching the first great object by which an almost despairing country might be reassured of its future welfare.

The final change in the views of Congress in regard to a convention was produced by the action of the legislature of New York. In that body, as we have seen, the impost system had been rejected, in the session of 1786, and the governor of the state had even refused to reassemble the legislature for the reconsideration of this subject. A new session commenced in January, 1787, in the city of New York, where Congress was also sitting. A crisis now occurred, in which the influence of Hamilton was exerted in the same manner that it had been in the former session, and with a similar result. On that occasion he had followed up the rejection of the impost system with a resolve for the appointment of commissioners to attend the meeting at Annapolis. It was now his purpose, in case the impost system should be again rejected, to obtain the sanction of Congress to the recommendation of a convention, made by the Annapolis commissioners. This, he was aware, could be effected only by inducing the legislature of New York to instruct the delegates of their state in Congress to move and vote for that decisive measure. The majority of the members of Congress were indisposed to adopt the plan of a convention; and although they might be brought to recommend it at the instance of a state, they were not inclined to do so spontaneously.<sup>1</sup> The crisis required, therefore, all the address of Hamilton and of the friends of the Union,

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<sup>1</sup> Madison. Elliot, V. 96.

to bring the influence of one of these bodies to bear upon the other.

The reiterated recommendation by Congress of the impost system, now addressed solely to the state of New York, who remained alone in her refusal, necessarily occupied the earliest attention of the new legislature.<sup>1</sup> A warm discussion upon a bill introduced for the purpose of effecting the grant as Congress had asked for it, ended, on the 15th of February, in its defeat. The subject of a general convention of the states, according to the plan of the Annapolis commissioners, was then before Congress, on the report of a grand committee;<sup>2</sup> and Congress were hesitating upon its expediency. At this critical juncture Hamilton carried a resolution in the legislature of New York, instructing the delegates of that state in Congress to move for an act recommending the states to send delegates to a convention for the purpose of revising the Articles of Confederation, which, four days afterwards, was laid before Congress.<sup>3</sup>

Virginia and North Carolina had already chosen delegates to the Convention, in compliance with the recommendation from Annapolis; and Massachusetts was about to make such an appointment, under the influence of her patriotic Bowdoin. In this posture of affairs, although the proposition of the New York delegation failed to be adopted,<sup>4</sup> the fact that she had thus solicited

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<sup>1</sup> It was brought before them by the speech of the governor (Clinton), informing them of the resolutions of Congress, which had requested an immediate call of the legislature to consider the revenue system, "a subject," he observed, "which had been repeatedly submitted to them, and must be well understood."

<sup>2</sup> Journals, XII. 15. February 21, 1787.

<sup>3</sup> Ibid. The vote rejecting the impost bill was taken on the 15th of February. The resolution of instructions was passed on the 17th, and was laid before Congress on the 21st.

<sup>4</sup> Mr. Madison has recorded the suspicions with which this resolution of the New York legislature was received. Their previous refusal of the impost act, and their known anti-federal tendencies, gave rise, he says, to the belief that their object was to obtain a convention without having it called under the authority of Congress, or else, by dividing the plans of the states in their appointments of delegates, to frustrate them all. (Madison. Elliot, V. 96). But whatever grounds there might have been for either of these suspicions, the latter certainly was not well founded. The New York resolution was drafted by Hamilton, and although it was passed by a body in which a majority had not exhib-

the action of Congress was of decisive influence, when the members from Massachusetts followed it immediately by a resolve more acceptable to a majority of the assembly.<sup>1</sup>

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ited a disposition to enlarge the authority of Congress, it was manifestly not intended to prevent the adoption of the plan of a convention. It contemplated the passage by Congress of an act, recommending the states to institute a convention of representatives of the states to revise the Articles of Confederation; and the resolution introduced by the New York delegation into Congress proposed that the alterations and amendments which the Convention might consider necessary to render the Articles of Confederation "adequate to the preservation and support of the Union" should be reported to Congress and to the states respectively, but did not direct how they should be adopted. This would have left open a great question, and seemed to be a departure from the mode in which the Articles of Confederation directed that amendments should be made. Probably it was Hamilton's intention to leave the form in which the new system should be adopted for future action, without fettering the movement by prescribing the mode before the Convention had assembled. But this course was practically impossible. Congress could not be prevailed upon to recommend a convention, without making the condition that the new provisions should be reported to Congress and confirmed by the states. This gave rise to great embarrassment in the Convention, when it came to be admitted that the Confederation must be totally superseded, and not *amended*; and it was finally disregarded. But it was the only mode in which the Convention could have been recommended by Congress, and without that recommendation, probably, it could not have been instituted.

<sup>1</sup> The resolution introduced by the Massachusetts delegation, when that of New York had been rejected, after being amended, was finally passed in the following terms: "Whereas, there is provision in the Articles of Confederation and Perpetual Union for making alterations therein, by the assent of a Congress of the United States, and of the legislatures of the several states; and whereas experience hath evinced that there are defects in the present Confederation, as a mean to remedy which several of the states, and particularly the state of New York, by express instructions to their delegates in Congress, have suggested a convention for the purposes expressed in the following resolution; and such a convention appearing to be the most probable means of establishing in these states a firm national government; *Resolved*, That in the opinion of Congress it is expedient that, on the second Monday in May next, a convention of delegates, who shall have been appointed by the several states, be held at Philadelphia, for the sole and express purpose of revising the Articles of Confederation, and reporting to Congress and the several legislatures such alterations and provisions therein as shall, when agreed to in Congress and confirmed by the states, render the Federal Constitution adequate to the exigencies of government and the preservation of the Union." Journals, XII. 17. February 21, 1787.

The recommendation, as it went forth from Congress, was strictly limited to a revision of the Articles of Confederation, by a convention of delegates, and the alterations and new provisions were to be reported to Congress, and were to be agreed to in Congress and confirmed by the states. Thus the resolution pursued carefully the mode of amendment and alteration provided by the Articles of Confederation, except that it interposed a convention for the purpose of originating the changes to be proposed in the existing form of government; adding, however, the great general purpose of rendering the Federal Constitution adequate to the exigencies of government and the preservation of the Union.

The point thus gained was of vast and decisive importance. That Congress should forego the right of originating changes in the system of government;<sup>1</sup> that it should advise the states to confer that power upon another assembly; and that it should sanction a general revision of the Federal Constitution, with the express declaration of its present inadequacy—were all preliminaries essential to a successful reform. Feeble as it had become from the overgrown vitality of state power, and from the lack of numbers and talent upon its roll, it was still the government of the Union; the Congress of America; the lineal successors of that renowned assembly which had defied the power of England, and brought into existence the thirteen United States. If it stood but the poor shadow of a great name, it was still a name with which to do more than conjure; for it bore a constitutional relation to the states, still revered by the wise and thoughtful, and still necessary to be regarded by all who desired the security of constitutional liberty. The risk of immediate attempts to establish a monarchical form of government was not inconsiderable. The risk that civil confusion would follow a longer delay to provide for the pressing wants of the country was greater. Dejection and despondency had taken hold of many minds of the

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<sup>1</sup> The Articles of Confederation did not expressly require that amendments should be prepared and proposed in Congress. The thirteenth Article provided that no alteration should be made, unless it should "be agreed to in a Congress of the United States, and be afterwards confirmed by the legislatures of every state." But it was clearly implied by this that Congress were to have the power of recommending alterations, and this power was exercised in 1783, with regard to the rule of apportionment.

highest order; while the great body of the people were desiring a change which they could not define, and which they feared, while they invited its approach. In such a state of things, considerate men were naturally unwilling to turn entirely away from Congress, or to exclude its agency altogether from the processes of reform, and to embark upon the uncertain sea of political experiment, without chart or rule to guide their course; for no man could tell what projects, what schemes, and what influences might arise to jeopard those great principles of republican liberty on which the political fabric had rested from the Declaration of Independence to the present hour of danger and distress.

For the wise precedent, thus established, of placing the formation of a new government under the direct sanction of the old one, the people of this country are indebted chiefly to Hamilton. Nothing can be more unfortunate, in any country, than the necessity or the rashness which sweeps away an established constitution before a substitute has been devised. Whether the interval be occupied by provisional arrangements, or left to a more open anarchy, it is an unfit season for the creation of new institutions. At such a time the crude projects of theorists are boldly intruded among the deliberations of statesmen; despotism lies in wait for the hazards by which liberty is surrounded; the multitude are unrestrained by the curb of authority; and society is exposed to the necessity of accepting whatever is offered, or of submitting to the first usurper who may seize the reins of government, because it has nothing on which to rest as an alternative. True liberty has gained little, in any age or country, from revolutions which have excluded the possibility of seeking or obtaining the assent of existing power to the reforms which the progress of society has demanded.

In the days when the Confederation was tottering to its fall; when its revenues had been long exhausted; and when its Congress embraced, in actual attendance, less than thirty delegates from only eleven of the states, it would have been the easy part of a demagogue to overthrow it by a sudden appeal to the passions and interests of the hour, as the first step to a radical change.<sup>1</sup> But the great man, whose mature and energetic youth,

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<sup>1</sup> Governor Randolph of Virginia, writing to Washington, on the 11th of

trained in the school of Washington, had been devoted to the **formation and establishment** of the Union, knew too well that, if its golden cord were once broken, no human agency could restore it to life. He knew the value of habit, the respect for an established, however enfeebled, authority; and while he felt and insisted on the necessity for a new constitution, and did all in his power to make the country perceive the defects of the old one, he wisely and honestly admitted that the assent of Congress must be gained to any movement which proposed to remedy the evil.

But the reason for not moving the revision of the system of government by Congress itself was one that could not be publicly stated. It was, that the highest civil talent of the country was not there. The men to whom the American people had been accustomed to look in great emergencies—the men who were called into the Convention, and whose power and wisdom were signally displayed in its deliberations—were then engaged in other spheres of public life, or had retired to the repose which they had earned in the great struggle with England. Had the attempt been made by Congress itself to form a constitution for the acceptance of the states, the controlling influence and wisdom of Washington, Franklin's wide experience and deep sagacity, the unrivalled capacities of Hamilton, the brilliant powers of Gouverneur Morris, Pinckney's fertility, and Randolph's eloquence, with all the power of their eminent colleagues and all the strength of principle and of character which they brought to the Convention, would have been withheld from the effort. One very important man, it is true, was still there. Madison was in Congress; and Madison's part in the framing of the Constitution was eminently conspicuous and useful. But without the concentration of talent

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March, 1787, and urging him to attend the Convention, said: "I must call upon your friendship to excuse me for again mentioning the Convention at Philadelphia. Your determination having been fixed on a thorough review of your situation, I feel like an intruder when I again hint a wish that you would join the delegation. But every day brings forth some new crisis, and the Confederation is, I fear, the last anchor of our hope. Congress have taken up the subject, and appointed the second Monday in May next as the day of meeting. *Indeed, from my private correspondence, I doubt whether the existence of that body, even through this year, may not be questionable under our present circumstances.*" Sparks's Washington, IX. 243, note.

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which the Convention drew together, representing every interest and every part of the Union, nothing could have been presented to the states, by the Congress of 1787, which would have commanded their assent. The Constitution owed as much, for its acceptance, to the weight of character of its framers, as it did to their wisdom and ability, for the intrinsic merits which that weight of character enforced.

It was fortunate, also, that the Congress did nothing more than to recommend the Convention, without undertaking to define its powers. The doubts concerning its legality, which led many persons of great influence to hesitate in sanctioning it, were thus removed, and the states were left free to join in the movement, as an expedient to discover and remedy the defects of the federal government, without fettering their delegates with explicit instructions.<sup>1</sup> In this way the Convention, although experimental and

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<sup>1</sup> The states of Virginia, New Jersey, Pennsylvania, North Carolina, and Delaware had appointed their delegates to the Convention before it was sanctioned by Congress. Virginia led the way; and the following preamble to her act shows with what motives and objects she did so. "Whereas, the commissioners who assembled at Annapolis, on the 14th day of September last, for the purpose of devising and reporting the means of enabling Congress to provide effectually for the commercial interests of the United States, have represented the necessity of extending the revision of the federal system to all its defects, and have recommended that deputies for that purpose be appointed by the several legislatures, to meet in convention in the city of Philadelphia, on the 2d day of May next—a provision which was preferable to a discussion of the subject in Congress, where it might be too much interrupted by the ordinary business before them, and where it would, besides, be deprived of the valuable counsels of sundry individuals who are disqualified by the constitution or laws of particular states, or restrained by peculiar circumstances from a seat in that assembly; And whereas the General Assembly of this commonwealth, taking into view the actual situation of the Confederacy, as well as reflecting on the alarming representations made from time to time by the United States in Congress, particularly in their act of the 15th day of February last, can no longer doubt that the crisis is arrived at which the good people of America are to decide the solemn question, whether they will, by wise and magnanimous efforts, reap the just fruits of that independence which they have so gloriously acquired, and of that Union which they have cemented with so much of their common blood—or whether, by giving way to unmanly jealousies and prejudices, or to partial and transitory interests, they will renounce the auspicious blessings prepared for them by the Revolution, and furnish to its enemies an eventful triumph

anomalous, derived its influence from the sources in which it originated, and was enabled, though not without difficulty, to meet the crisis in which the country was placed. That crisis was one of a

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over those by whose virtue and valor it has been accomplished; And whereas the same noble and extended policy, and the same fraternal and affectionate sentiments, which originally determined the citizens of this commonwealth to unite with their brethren of the other states in establishing a federal government, cannot but be felt with equal force now as motives to lay aside every inferior consideration, and to concur in such further concessions and provisions as may be necessary to secure the great objects for which that government was instituted, and to render the United States as happy in peace as they have been glorious in war; *Be it therefore enacted, etc.*, That seven commissioners be appointed, by joint ballot of both houses of assembly, who, or any three of them, are hereby authorized as deputies from this commonwealth to meet such deputies as may be appointed and authorized by other states, to assemble in convention at Philadelphia, as above recommended, and to join with them in devising and discussing all such alterations and further provisions as may be necessary to render the Federal Constitution adequate to the exigencies of the Union; and in reporting such an act, for that purpose, to the United States in Congress, as, when agreed to by them, and duly confirmed by the several states, will effectually provide for the same." (Elliot, I. 132.) The instructions of New Jersey to her delegates were, "to take into consideration the state of the Union as to trade and other important objects, and of devising such other provisions as shall appear to be necessary to render the Constitution of the federal government adequate to the exigencies thereof." (Ibid., 128.) The act of Pennsylvania provided for the appointment of deputies to join with the deputies of other states "in devising, deliberating on, and discussing all such alterations and further provisions as may be necessary to render the Federal Constitution fully adequate to the exigencies of the Union, and in reporting such act or acts, for that purpose, to the United States in Congress assembled, as, when agreed to by them, and duly confirmed by the several states, will effectually provide for the same." (Ibid., 130.) The instructions of Delaware were of the same tenor. (Ibid., 131.) The act of North Carolina directed her deputies "to discuss and decide upon the most effectual means to remove the defects of our Federal Union, and to procure the enlarged purposes which it was intended to effect; and that they report such an act to the General Assembly of this state, as, when agreed to by them, will effectually provide for the same." (Ibid., 135.) The instructions to the delegates of New Hampshire were of the same tenor. (Ibid., 126.) The appointment of the delegates of Massachusetts was made with reference to the terms of the resolve of Congress recommending the Convention, and for the purposes declared therein. (Ibid., 126, 127.) The appointment of Connecticut was made with the same reference, and with the further direction "to discuss upon such alterations and provisions, agreeably to the general principles of

singular character; for the continued existence of the Union and the fate of republican governments were both involved. It was felt and admitted by the wisest men of that day that if the Convention should fail in devising and agreeing upon some system of government, at once capable of pervading the country with an efficient control, and essentially republican in its form, the Federal Union would be at an end. But its dissolution, in the state in which the country then was, must have been followed by an attempt to establish monarchical government; because the state institutions were destitute of the strength necessary to encounter the agitation which would have followed the downfall of the federal power, and yet some substitute for that power must have been found. But without civil war, and the most frightful social convulsions, nothing in the nature of monarchy could ever have been established in this country after the Revolution. "Those who lean to a monarchical government," said Washington, "have either not consulted the public mind, or they live in a region which (the levelling principles in which they were bred being entirely eradicated) is much more productive of monarchical ideas than is the case in the Southern States, where, from the habitual distinctions which have always existed among the people, one would have expected the first generation and the most rapid growth of them. I am also clear that, even admitting the utility, nay, necessity, of the form, the period is not arrived for adopting the change without shaking the peace of this country to its foundation. That a thorough reform of the present system is indispensable, no one, who has a capacity to judge, will deny; and with hand and heart I hope the business will be essayed in a full convention. After which, if more powers and more decision are not found in the existing form, if it still wants energy and that secrecy and despatch (either from the non-attendance or the local views

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republican government, as they shall think proper to render the Federal Constitution adequate to the exigencies of government and the preservation of the Union; and they are further directed, pursuant to the said act of Congress, to report such alterations and provisions as may be agreed to by a majority of the United States represented in convention, to the Congress of the United States, and to the General Assembly of this state." (*Ibid.*, 127.) The resolutions of New York, Maryland, South Carolina, and Georgia pursued nearly the same terms with the resolve of Congress. (*Ibid.*, 127, 131, 136, 137.)

of its members) which are characteristic of good government, and if it shall be found (the contrary of which, however, I have always been more afraid of than the abuse of them) that Congress will, upon all proper occasions, exert the powers which are given with a firm and steady hand, instead of frittering them back to the states, where the members, in place of viewing themselves in their national character, are too apt to be looking—I say, after this essay is made, if the system proves inefficient, conviction of the necessity of a change will be disseminated among all classes of the people. Then, and not till then, in my opinion, can it be attempted without avoiding all the evils of civil discord.”<sup>1</sup>

There were other difficulties besides those which may be called legal, or technical, attending this effort to revise the system of the federal government. The failure of that system, as it had been put in operation in 1781, had, to a great extent, chilled the hopes of many of the best statesmen of America. It had been established under auspices which seemed to promise far different fruits from those it had actually produced. Its foundations were laid in the patriotism and national feeling of the states. The concessions which had been made to secure a union of republics having various, and, in some respects, conflicting interests, seemed at first to guarantee the prompt and faithful performance of its obligations. But this fair promise had melted into most unsubstantial performance. The Confederation was framed upon a principle which never has enabled, and probably never will enable, a government to become effective and permanent—the principle of a league.

Another and a very serious cause for discouragement was the sectional and state pride which had been constantly growing, from the Declaration of Independence to the time when the states were called upon to meet each other upon broader grounds, and to make even larger sacrifices than at any former period. It is difficult to trace to all its causes the feeling which has at times arrayed the different extremities of this Union against each other. It was very early developed, after the different provinces were obliged to act together for their great mutual objects of political independence; and, even in its highest paroxysms, prior to our late civil

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<sup>1</sup> Sparks's Washington, IX. 223, 225, 230, 236, 508-520.

war, it always found an antidote in the deeper feelings and more sober calculations of a consistent patriotism. Perhaps its prevalence and activity may with more truth be ascribed, in every generation, to the ambition of men who find in it a convenient instrument of local influence, rather than to any other cause. It is certain that, when it has raged most violently, this has been its chief aggravating element. The differences of neither manners, institutions, climate, nor pursuits would at any time have been sufficient to create the perils to which the Union of the states has occasionally been exposed, without the mischievous agency of men whose personal objects are, for the time, subserved by the existence of such peculiarities. The proof of this is to be found in the fact that the seasonable sagacity of the people has sometimes detected the motives of those who have sought to employ their passions, and has compelled them at last to give way to that better order of men who have appealed to their reason. But, unhappily, this has not always been the case.

The difficulty of getting the assent of all the states to radical changes in the federal system, and the uncertainty as to the mode in which such changes could be effectively adopted, were also among the reasons which led many persons to regard the Convention as an experiment of doubtful expediency. The states had hitherto acted only in their corporate capacities, in all that concerned the formation and modification of the Union. The idea of a union founded on the direct action of the people of the states, in a primary sense, and proceeding to establish a federal government, of limited powers, in the same manner in which the people of each state had established their local constitutions, had not been publicly broached, and was not generally entertained. Indeed, there was no expectation on the part of any state, when the delegates to the Convention were appointed, that any other principle would be adopted as the basis of action than that by which the Articles of Confederation contemplated that all changes should be effected by the action of the states assembled in Congress, confirmed by the unanimous assent of the different state legislatures.

The prevailing feeling among the higher statesmen of the country was that the Convention was an experiment of doubtful tendency, but one that must, nevertheless, be tried. Washington,

Madison, Jay, Knox, Edmund Randolph, have all left upon record the evidence of their doubts and their fears, as well as of their convictions of the necessity for this last effort in favor of the preservation of a republican form of government.<sup>1</sup> Hamilton advanced to meet the crisis with perhaps less hesitation than any of the revolutionary statesmen. His great genius for political construction; his large knowledge of the means by which a regulated liberty may be secured; and the long study with which he had contemplated the condition of the country, led him to enter the Convention with more of eagerness and hope than most of its members. He saw with great clearness that the difficulty which embarrassed nearly all his contemporaries—the question of the mode of enacting a new constitution—was capable of solution. He did not propound that solution in advance of the assembling of the Convention; for it was eminently necessary that the states should not be alarmed by the suggestion of a principle so novel and so unlike the existing theory of the Union. But he was fully prepared to announce it, so soon as it could be received and acted upon.

It was under such auspices and with such views that the Convention assembled at Philadelphia on the fourteenth day of May, in the year seventeen hundred and eighty-seven.

At that time the world had witnessed no such spectacle as that of the deputies of a nation, chosen by the free action of great communities, and assembled for the purpose of thoroughly reforming its constitution, by the exercise and with the authority of the national will. All that had been done, both in ancient and in modern times, in forming, moulding, or modifying constitutions of government, bore little resemblance to the present undertaking of the states of America. Neither among the Greeks nor the Romans was there a precedent, and scarcely an analogy. The ancient leagues of some of the cities or republics of Greece did not amount to constitutions, in the sense of modern political science; and the Roman republic was but the domination of a single race of the inhabitants of a single city.

In modern Europe we find no trace of political science until

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<sup>1</sup> Sparks's Washington, IX. 223, 225, 230, 233, 508-520.

after the nations were divided, and partial limits set to the different orders and powers of the state. The feudal system, which acknowledged no relations in society but those of lord and serf, necessarily forbade all consideration of any forms of government which were not essentially founded on that relation; and it was not until that relation had been in some degree broken in upon that there began to be anything like theoretical inquiries into natural rights. When this took place—at the end, or towards the end, of the Middle Ages—the peculiar forms of the European governments gave rise to inquiries into the relation of sovereign and subject. From the beginning of the fifteenth down to the end of the seventeenth century there were occasional discussions on the continent, growing out of particular events, of such questions as the right of the people to depose bad princes, and how far it was lawful to resist oppression. But questions of constitutional form, or of the right of the people to arrange and distribute the different powers of government, or the best mode of doing it, did not arise at all.

In England, from the time of the Conquest until Magna Charta had gone far towards destroying the system, a feudal monarchy had precluded all questions touching the form or the spirit of government. The chief traits of the present constitution, which arose in a great measure from the circumstance that the lower orders of the nobility became gradually so much amalgamated with the people as to give rise to the distinct power of the commons, have all along been inconsistent with the enactment of new forms of civil polity; although, from the time of the Reformation to the Revolution of 1688, the active principles of English freedom have, at different junctures, made advances of the utmost importance. The foundations on which the Stuarts sought to establish their throne were directly at variance with the spirit and principles of the Reformation, which totally denied the doctrine of passive and unlimited obedience, and which led to the struggles that gave birth to the Puritans. Those severe reformers, whose church constitution was purely republican, naturally sought to carry its principles into the state. The result was the parliamentary troubles of James the First, the execution of Charles the First under the forms of judicial proceeding, and the despotism of Cromwell under the forms of a commonwealth. Charles the Second returned,

untaught by all that had happened, to attempt the re-establishment of the Stuart principles of unlimited obedience; and James the Second, who naturally united to them the Catholic religion, being driven from his kingdom, the question arose of a vacant throne, and how it should be filled. In all these events, however, from the death of Elizabeth to the great discussions which followed the abdication of James the Second, the idea of calling upon the people of England to frame a government of their own choice, and to define the limits and powers of its various departments, never arose. The Convention Parliament discussed, and were summoned to discuss, but a single fundamental question—that involving the disposal of the crown.

Still, the political troubles of England gave rise to many theoretical discussions of natural right and of the origin and structure of society. As soon as Charles the First was executed this discussion arose abroad, from his friends, who wrote, or influenced others to write, in defence of the divine right of kings. Hobbes and Filmer followed, in England, on the same side, and Milton, Locke, and Algernon Sidney vindicated the natural and inalienable rights of the subject and the citizen. In the works of these great writers the foundations of society are examined with an acuteness which has left little to be done in the merely speculative part of political inquiry. But the practical effect of their theories never went further than the promotion, to a greater or less extent, of the particular views which they desired to inculcate concerning the existing constitution, or the particular events out of which the discussion arose.

Nor should we forget what had been done in France by the wise and cautious Montesquieu, or by the vehement and passionate Rousseau, and the writers of his school. The former, drawing all his views from history and experience, undertook to show, from the antecedents of each state, the character of its constitution, to explain and develop its peculiar properties, and thence to determine the principles on which its legislation should proceed. The latter, starting from an entirely opposite point, and designing to write a treatise on politics in the widest sense of the term, became a mere theorist, and produced only certain brilliant speculations upon the social compact, of a purely democratic character, as fragments of a work which he never finished. The crowd of



writers, too, who preceded, and in part created the French Revolution, which was just commencing its destructive activity as our Constitution was formed, really contributed nothing of practical value to the solution of such great questions as the mode of forming, vesting, and distributing the various branches of sovereign power.

Thus there was little for American statesmen of that day to look to, in the way of theories which had been practically proved to be sound and useful. The constitution of England, it is true, presented to them certain great maxims, the application of which was not unsuited to the circumstances and habits of a people whose laws and institutions had been derived from their English ancestors and their English blood. But the constitution of England, embracing the three estates of king, lords, and commons, had become what it was only by the extortion from the crown of the rights and privileges of the two orders of the people. The American Revolution, on the other hand, had settled, as the fundamental principle of American society, that all sovereignty resides originally in the people; that they derive no rights by way of grant from any other source; and, consequently, that no powers or privileges can exist in any portion of the people as distinct from the whole. The English constitution could, therefore, furnish only occasional analogies for particular details in the structure of departments, which might after all really require to be founded on different fundamental principles. But the great problem to be solved—for which English experience was of no value—was, so to parcel out those portions of original sovereignty, which the people of the states might be willing to withdraw from their state institutions, as to constitute an efficient federal republic, which yet would not control and absorb the state powers that might be reserved. But to comprehend the results that were accomplished, and to understand the true nature of the system bequeathed to us, it is indispensable to examine in detail the means and processes by which it was formed. Before we turn, however, to this great subject, the characters of the principal framers of the Constitution demand our attention.

## CHAPTER XVI.

### THE FRAMERS OF THE CONSTITUTION.—WASHINGTON, PRESIDENT OF THE CONVENTION.

THE narrative to which the reader has thus far attended must now be interrupted for a while, that he may pause upon the threshold of an assembly which had been summoned to the grave task of remodelling the Constitution of this country, and here consider the names and characters of the men to whom its responsible labors had been intrusted. The civil deeds of statesmen and lawgivers, in establishing and forming institutions, incorporating principles into the forms of public administration, and setting up the defences of public security and prosperity, are far less apt to attract and hold the attention of mankind than the achievements of military life. The name, indeed, may be forever associated with the work of the hand, but the mass of mankind do not study, admire, or repeat the deeds of the lawgiver as they do those of the hero. Yet he who has framed a law, or fashioned an institution in which some great idea is made practical to the conditions of human existence, has exercised the highest attributes of human reason, and is to be counted among the benefactors of his race.

The framers of the Constitution of the United States assembled for their work amid difficulties and embarrassments of an extraordinary nature. No general concert of opinion had taken place as to what was best, or even as to what was possible to be done. Whether it were wise to hold a convention, whether it were even legal to hold it, and whether, if held, it would be likely to result in anything useful to the country, were points upon which the most opposite opinions prevailed in every state of the Union. But it was among the really fortunate, although apparently unhappy, circumstances under which they were assembled, that the country had experienced much trial, suffering, distress, and failure. It has been a disagreeable duty to describe the disasters and

errors of a period during which the national character was subjected to the discipline of adversity. We now come to the period of compensation which such discipline inevitably brings.

There is a law in the moral government of the universe, which ordains that all that is great and valuable and permanent in character must be the result, not of theoretical teaching, or natural aspiration—of spontaneous resolve, or uninterrupted success—but of trial, of suffering, of the fiery furnace of temptation, of the dark hours of disappointment and defeat. The character of the man is distinguishable from the character of the child that he once was, chiefly by the effects of this universal law. There are the same natural impulses, the same mental, moral, and physical constitution with which he was born into the world. What is it that has given him the strength, the fortitude, the unchanging principle, and the moral and intellectual power which he exhibits in after-years? It has not been constant pleasure and success, nor unmingled joy. It has been the hard discipline of pain and sorrow, the stern teachings of experience, the struggle against the consequences of his own errors, and the chastisement inflicted by his own faults.

This law pertains to all human things. It is as clearly traceable in its application to the character of a people as to that of an individual; and as the institutions of a people, when voluntarily formed by them out of the circumstances of their condition, are necessarily the result of the previous discipline and the past teachings of their career, we can trace this law also in the creation and growth of what is most valuable in their institutions. When we have so traced it, the unalterable relations of the moral universe entitle us to look for the elements of greatness and strength in whatever has been the product of such teachings, such discipline, and such trials.

The Constitution of the United States was eminently the creature of circumstances; not of circumstances blindly leading the blind to an unconscious submission to an accident, but of circumstances which offered an intelligent choice of the means of happiness, and opened, from the experience of the past, the plain path of duty and success, stretching onward to the future. All that has been said in the previous chapters tends to illustrate this fact. We have seen the American people—divided into separate

and isolated communities, without nationality, except such as resulted from a general community of origin—undertaking together the work of throwing off the domination of their parent state. We have seen them enter upon this undertaking without forming any political bond of a national character, and without instituting any proper national agency. We have seen that the first government which they created was, practically, a mere general council for the recommendation of measures to be adopted and executed by the several constituencies represented. We have seen no machinery instituted for the accomplishment, by the combined authority of these separate communities, of the great objects at which they were aiming; and although in theory the Revolutionary Congress would have been entitled to assume and exercise the powers necessary to accomplish the objects for which it was assembled, we have seen that the people of the country, from a jealous and unreasonable fear of all power, would not permit this to be done.

The consequences of this want of power were inevitable. An army could not be kept in the field, on a permanent footing, capable of holding the enemy in check. The city of New York fell into the hands of that enemy, the intermediate country between that city and the city of Philadelphia was overrun, and from the latter capital, the seat of the general government, the Congress was obliged to fly before the invading foe.

Taught by these events that a more effective union was necessary to the deliverance of the country from a foreign yoke, the states at length united in the establishment of a government, the leading purpose of which was mutual defence against external attacks, and called it a Confederation. But its powers were so restricted, and its operations so clogged and impeded by state jealousies and state reservations of power, that it lacked entirely the means of providing the sinews of war out of the resources of the country, and was driven to foreign loans and foreign arms for the means of bringing that war to a close. A vast load of debt was thus accumulated upon the country; and as soon as peace was established it became apparent that, while the Confederation was a government with the power of contracting debts, it was without the power of paying them. This incapacity revealed the existence of great objects of government without which the people of the sev-

eral states could never prosper, and which, in their separate capacities, the states themselves could never accomplish.

Now it is as certain as history can make anything that the whole period, from the commencement of the war to the end of the Confederation, was a period of great suffering to the people of the United States. The trials and hardships of war were succeeded by the greater trials and hardships of a time of peace, in which the whole nation experienced that greatest of all social evils, the want of an efficient and competent government. There was a gloom upon the minds of men—a sense of insecurity—a consciousness that American society was not fulfilling the ends of its being by the development of its resources and the discharge of its obligations—which constituted altogether a discipline and a chastisement of the whole nation, and which we are not at liberty to regard as the mere accidents of a world ungoverned by an overruling Power.

It was from the midst of that discipline that the American people came to the high undertaking of forming for themselves a constitution, by which to work out the destiny of social life in this Western World. Had they essayed their task after years of prosperity, and after old institutions and old forms of government had, upon the whole, yielded a fair amount of success and happiness, they would have wanted that power which comes only from failure and disappointment—the power to adapt the best remedy to the deepest social defects, and to lay hold on the future with the strength given by the hard teachings of the past.

Civil liberty—American liberty—that liberty which resides in law, which is protected by great institutions and upheld by the machinery of a popular government—is not simply the product of a desire, or a determination, to be free. Such liberty comes, if it comes at all, only after serious mistakes—after frightful deficiencies have taught men that power must be lodged somewhere. It comes when a people have learned, by adversity and disappointment, that a total negation of all authority, and a jealousy of all restraint, can end only in leaving society without the defences and securities which nothing but law can raise for it. It comes when the passions are exhausted, and the rivalries of opposing interests have worn themselves out, in the vain endeavor to reach what reason and justice and self-sacrifice alone can procure. Then, and

then only, is the intellect of a nation sure to operate with the fidelity and energy of its native power. Then only does it grasp the principles of freedom with the ability to incorporate them into the practical forms of a public administration whose strength and energy shall give them vitality, and prevent their diffusion into the vagueness of mere abstractions, which return to society the cold and mocking gift of a stone for its craving demand of bread.

The Convention was a body of great and disinterested men, competent, both morally and intellectually, to the work assigned them. High qualities of character are requisite to the formation of a system of government for a wide country with different interests. Mere talent will not do it. Intellectual power and ingenuity alone cannot compass it.

There must be a moral completeness in the characters of those who are to achieve such a work ; for it does not consist solely in devising schemes, or creating offices, or parcelling out jurisdictions and powers. There must be adaptation, adjustment of conflicting interests, reconciliation of conflicting claims. There must be the recognition and admission of great expedients, and the sacrifice, often, of darling objects of ambition, or of local policy, to the vast central purpose of the greatest happiness of the greatest number. Hence it is, that, wherever this mighty work is to be successfully accomplished, there must be a high sense of justice ; a power of concession ; the qualities of magnanimity and patriotism ; and that broad moral sanity of the intellect which is furthest removed from fanaticism, intolerance, or selfish adhesion either to interest or to opinion.

These qualities were pre-eminently displayed by many of the framers of the Constitution. There was certainly a remarkable amount of talent and intellectual power in that body. There were men in that assembly whom, for genius in statesmanship, and for profound speculation in all that relates to the science of government, the world has not seen overmatched.

But the same men who were most conspicuous for these brilliant gifts and acquirements, for their profound theories and their acute perception of principles, were happily the most marked, in that assembly, for their comprehensive patriotism, their justice, their unselfishness and magnanimity. Take, for instance, Hamil-

ton. Where, among all the speculative philosophers in political science whom the world has seen, shall we find a man of greater acuteness of intellect, or more capable of devising a scheme of government which should appear theoretically perfect? Yet Hamilton's unquestionable genius for political disquisition and construction was directed and restrained by a noble generosity, and an unerring perception of the practicable and the expedient, which enabled him to serve mankind without attempting to force them to his own plans, and without compelling them into his own views. Take Washington, whose peculiar greatness was a moral elevation, which secured the wisest and best use of all his powers in either civil or military life. Take Madison, who certainly lacked neither ability nor inclination for speculative inquiries, and who had a mind capable of enforcing the application of whatever principles he espoused. Yet his calm good sense, and the tact with which he could adapt theory to practice, were no less among his prominent characteristics. Take Franklin, who sometimes held extreme opinions, and occasionally pushed his peculiar fancies, springing from an excess of worldly wisdom, to the utmost verge of truth, but whose intellect was tempered and whose whole character was softened by the wide and varied experience of a life that had been commenced in obscurity, and was now closing with the honors of a reputation that filled the Eastern as well as the Western Hemisphere. Take Gouverneur Morris, who was ardent, impulsive, and not disinclined to tenacity of opinion; but he rose above all local and narrow objects, and embraced, in the scope of his clear and penetrating vision, the happiness and welfare of this whole continent.

It was a most fortunate thing for America that the Revolutionary age, with its hardships, its trials, and its mistakes, had formed a body of statesmen capable of framing for it a durable constitution. The leading persons in the Convention which formed the Constitution had been actors, either in civil or military life, in the scenes of the Revolution. In those scenes their characters as American statesmen had been formed. When the condition of the country had fully revealed the incapacity of its government to provide for its wants, these men were naturally looked to, to construct a system which should save it from anarchy. And their great capacities, their high, disinterested purposes, their free-

dom from all fanaticism and illiberality, and their earnest, unconquerable faith in the destiny of their country, enabled them to found that government which now upholds and protects the whole fabric of liberty in the states of this Union.

No such assembly, in that or in any other age, in this or in any other country, could be called together for such a purpose, without exhibiting a great diversity of opinions, wishes, and views. The very object for which they were assembled was of a nature to develop, to the fullest extent, the most conflicting opinions and the most opposite theories. That object was to devise a system which should best secure the permanent liberty and happiness of a vast country. What subject, in the whole range of human thought and human endeavor, could be more complex than this? What occasion, among all the diversities of human affairs, could present a wider field for honest differences of opinion, and for severe conflicts of mind with mind? Yet it should never be forgotten, as the merit of this assembly, that, collectively and individually, they were animated by the most pure and exclusive devotion to the object for which they were called together. It was this high patriotism, this deep and never-ceasing consciousness that the great experiment of republican liberty turned on the result of their labors, as on the hazard of a die, that brought at last all conflicts of interest, all diversities of opinion and feeling, into a focus of conciliation and unanimity. More than once the reader will find them on the point of separating without having accomplished anything; and more than once he will see them recalled to their mighty task by the eloquence of some master-spirit, who knew how to touch the keynote of that patriotic feeling which was never wholly lost in the jarring discords of debate and intellectual strife. For four months the laborious effort went on. The serene and unchanging presence of Washington presided over all. The chivalrous sincerity and disinterestedness of Hamilton pervaded the assembly with all the power of his fascinating manners. The flashing eloquence of Gouverneur Morris recalled the dangers of anarchy, which must be accepted as the alternative of an abortive experiment. The calm, clear, statesmanlike views of Madison, the searching and profound expositions of King, the prudent influence of Franklin, at length ruled the hour.

In examining their work, and in reading all that is left to us



of their discussions, we are to consider the materials out of which they had to frame a system of republican liberty, and the point of view, in reference to the whole subject, at which they stood. We are to remember how little the world had then seen of real liberty united with personal safety and public security; and how entirely novel the undertaking was, to form a complete system of government, wholly independent of tradition, exactly defined in a written constitution, to be created at once, and at once set in motion, for the accomplishment of the great objects of human liberty and social progress. The examples of Greece and Rome, the modern republics of Italy, the federal relations of the Swiss Cantons, and the distant approach to republicanism that had been seen in Holland, might be resorted to for occasional and meagre illustrations of a few general principles. But, unquestionably, the country which, up to that moment, had exhibited, by the working of its government, the greatest amount of liberty combined with the greatest public security, was England. England, however, was a monarchy; and monarchy was the system which they both desired, and were obliged, to avoid. If it was within the range of human possibility to establish a system of republican government which would fulfil its appropriate duties over this vast and rapidly extending country, *that* they felt, one and all, to be their great task. On the other hand, they knew that, if to that form they could not succeed in giving due stability and wisdom, it would be, in the words of Hamilton, "disgraced and lost among ourselves, disgraced and lost to mankind forever."<sup>1</sup> Here was their trial—the difficulty of all their difficulties; and it was here that they exhibited a wisdom, a courage, and a capacity which have been surpassed by no other body of lawgivers ever assembled in the world.

Their country had, a few years before, passed through a long and distressing war with its parent state. The yoke of her domination had been thrown off, and its removal was naturally followed by a loosening of the bands of all authority, and an indisposition to all new restraints. The American colonies had become independent states; and as the spirit of liberty which pervaded them made individuals impatient of control in their political

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<sup>1</sup> Madison's Debates in the Federal Convention. Elliot, V. 244.

relations, so the states reflected the same spirit in their corporate conduct, and looked with jealousy and distrust upon all powers which were not to be exercised by themselves. Yet it was clear that there were powers and functions of government which, for the absolute safety of the country, must be withdrawn from the states and vested in some national head, which should hold and exercise them in the name of the whole, for the good of the whole. The great question was, what that national head was to be; and the great service performed by the framers of the Constitution consisted in devising a system by which a national sovereignty might be endowed with energy, dignity, and power, and the forms and substance of popular liberty still be preserved; a system by which a supreme authority in all the matters which it touched might be created, resting directly on the popular will, and to be exercised, in all coming time, through forms and institutions under which that will should have a direct and perpetual and perpetually renewed expression. This they accomplished. They accomplished it, too, without abolishing the state governments, and without impairing a single personal right which existed before they began their work. They accomplished it without violence; without the disruption of a single fibre in that whole delicate tissue of which society is made up. No drop of blood was shed to establish this government, the work of their hands, and no moment of interruption occurred to the calm, even tenor of the pursuits of men—the daily on-goings of society, in which the stream of human life and happiness and progress flows on in beneficence and peace.

First upon the list of those who had been called together for this great purpose, we are to mention him without whose presence and countenance all men felt that no attempt to meliorate the political condition of the country could succeed.

I have already given an account of the proceedings which led directly to the calling of the Convention; and have mentioned the interesting fact that the impulse to those proceedings was given at Mount Vernon. Thither Washington had retired at the close of the war, with no thought of ever engaging again in public affairs. He supposed that for him the scene was closed. "The noontide of life," said he, in a letter to the Marchioness de Lafayette, "is now past, with Mrs. Washington and myself; and

all we have to do is to glide gently down a stream which no human effort can ascend.”<sup>1</sup>

But wise and far-seeing as he was, he did not foresee how soon he was to be called from that grave and sweet tranquillity. He was busy with the concerns of his farm; he was tasting the happiness of home, from which he had been absent nine long years; he was “cultivating the affections of good men, and practising the domestic virtues.” But it was not in his nature to be inattentive to the concerns of that country for whose welfare he had labored and suffered so much. He maintained an active correspondence with several of the most eminent and virtuous of his compatriots in different parts of the Union; and in that correspondence, running through the years 1784, 1785, and 1786, there exists the most ample evidence of the downward tendency of things, and of the fears it excited.

It had become evident to him that we never should establish a national character, nor be justly considered and respected by the nations of Europe, without enlarging the powers of the federal government for the regulation of commerce. The objection which had been hitherto urged, that some states might be more benefited than others by a commercial regulation, seemed to him to apply to every matter of general utility. “We are,” said he, writing in the summer of 1785, “either a united people under one head, and for federal purposes, or we are thirteen independent sovereignties eternally counteracting each other. If the former, whatever such a majority of the states as the Constitution points out conceives to be for the benefit of the whole, should, in my humble opinion, be submitted to by the minority. Let the Southern States always be represented; let them act more in union; let them declare freely and boldly what is for the interest of, and what is prejudicial to, their constituents; and there will, there must be, an accommodating spirit. In the establishment of a navigation act, this, in a particular manner, ought and will doubtless be attended to. If the assent of nine states, or, as some propose, of eleven, is necessary to give validity to a commercial system, it insures this measure, or it cannot be obtained.

“Wherein, then, lies the danger? But if your fears are in dan-

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<sup>1</sup> Washington's Writings, IX. 166.

ger of being realized, cannot certain provisos in the ordinance guard against the evil? I see no difficulty in this, if the Southern delegates would give their attendance in Congress, and follow the example, if it should be set them, of adhering together to counteract combination. I confess to you, candidly, that I can foresee no evil greater than disunion; than those unreasonable jealousies (I say *unreasonable*, because I would have a *proper* jealousy always awake, and the United States on the watch to prevent individual states from infracting the Constitution with impunity) which are continually poisoning our minds and filling them with imaginary evils for the prevention of real ones."<sup>1</sup>

But, while he desired to see the ninth article of the Confederation so amended and extended as to give adequate commercial powers, he feared that it would be of little avail to give them to the existing Congress. The members of that body seemed to him to be so much afraid of exerting the powers which they already possessed that they lost no opportunity of surrendering them or of referring their exercise to the individual states. The speculative question, whether foreign commerce is of any real advantage to a country, he regarded as of no importance, convinced that the spirit of trade which pervaded these states was not to be restrained. It behooved us, therefore, to establish just principles of commercial regulation, and this could not, any more than other matters of national concern, be done by thirteen heads differently constructed and organized. The necessity, in fact, of a controlling power was obvious, and why it should be withheld was, he declared, beyond his comprehension. With these views he looked to the Convention at Annapolis as likely to result in a plan which would give to the federal government efficient powers for all commercial purposes, although he regretted that more objects had not been embraced in the project for the meeting.

The failure of this attempt to enlarge the commercial powers of Congress, and the recommendation of a general convention made by the Annapolis commissioners, placed the country in an extremely delicate situation. Washington thought, when this recommendation was announced, that the people were not then sufficiently misled to retract their error, and entertained some

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<sup>1</sup> Washington's Writings, IX. 121.

doubt as to the consequences of an attempt to revise and amend the Articles of Confederation. Something, however, must be done, he said, or the fabric, which was certainly tottering, would inevitably fall. "I think," said he, "often of our situation, and view it with concern. From the high ground we stood upon, from the plain path which invited our footsteps, to be so fallen, so lost, is really mortifying; but virtue, I fear, has in a great degree taken its departure from our land, and the want of a disposition to do justice is the source of the national embarrassments; for, whatever guise or color is given to them, this I apprehend is the origin of the evils we now feel, and probably shall labor under for some time yet."<sup>1</sup>

At this time the legislature of Virginia were acting upon the subject of a delegation to the Federal Convention, and a general wish was felt to place Washington at the head of it. No opposition had been made in that body to the bill introduced for the purpose of organizing and instructing such a delegation, and it was thought advisable to give the proceeding all the weight which could be derived from a single state. To a private intimation of this desire of the legislature he returned a decided refusal. Several obstacles appeared to him to put his attendance out of the question. The principal reason that he assigned was, that he had already declined a re-election as President of the Society of Cincinnati, and had signified that he should not attend their triennial general meeting, to be held in Philadelphia in the same month with the convention.<sup>2</sup> He felt a great reluctance to do anything which might give offence to those patriotic men, the officers of the army who had shared with him the labors and dangers of the war. He had declined to act longer with that society because the motives and objects of its founders had been misconceived and misrepresented. Originally a charitable institution, it had come to be regarded as anti-republican in its spirit and tendencies. Desiring, on the one hand, to avoid the charge of deserting the officers who had nobly supported him, and had always treated him with the greatest attention and attachment; and wishing, on the other hand, not to be thought willing to give his support to an institution generally believed incompatible with republican princi-

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<sup>1</sup> Washington's Writings, IX. 167.

Ibid., 212.

ples—he had excused his attendance upon the ground of the necessity of devoting himself to his private concerns. He had, in truth, a great reluctance to appear again upon any public theatre. His health was far from being firm; he felt the need and coveted the blessing of retirement for the remainder of his days; and although some modifications of the society whose first president he had been were then allaying the jealousies it had excited, he withdrew from this, the last relation which had kept him in a conspicuous public position.

But Washington at Mount Vernon, cultivating his estate, and rarely leaving his own farms, was as conspicuous to the country as if he were still placed in the most active and important public stations. All eyes were turned to him in this emergency; all thoughts were employed in considering whether his countenance and his influence would be given to this attempt to create a national government for the states whose liberties he had won. His friends represented to him that the posture of public affairs would prevent any criticism on the situation in which the contemporary meeting of the Cincinnati would place him, if he were to accept a seat in the Convention. Still, when the official notice of his appointment came, in December, he formally declined, but was requested by the governor of the state to reserve his decision.<sup>1</sup> At this moment the insurrection in Massachusetts broke upon him like a thunderbolt. “What, gracious God!” he exclaimed, “is man, that there should be such inconsistency and perfidiousness in his conduct! It was but the other day that we were shedding our blood to obtain the constitutions under which we now live—constitutions of our own choice and making—and now we are unsheathing the sword to overturn them! The thing is so unaccountable that I hardly know how to realize it, or to persuade myself that I am not under the illusion of a dream.”<sup>2</sup>

It was clear that, in case of civil discord and open confusion extending through any considerable part of the country, he would be obliged to take part on one side or the other, or to withdraw from the continent; and he, as well as other reflecting men, were not without fears that the disturbances in the Eastern States might extend throughout the Union. He consulted with his

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<sup>1</sup> Washington's Writings, IX. 219.

Ibid., 221.

friends in distant parts of the country, and requested their advice, but still, as late as February, hesitated whether he should attend the Convention. In that month he heard of the suppression of the rebellion in Massachusetts; but the developments which it had made of the state of society, the necessity which it had revealed for more coercive power in the institutions of the country, and the fear which it had excited that this want might lead men's minds to entertain the idea of monarchical government, finally decided him to accept the appointment. The possibility that his absence at such a juncture might be construed into what he called "a dereliction of republicanism," seems to have influenced his decision more than all other reasons. Congress, it is true, had now sanctioned the Convention, and this had removed one obstacle which had weighed with him and with others. He entertained great doubts as to the result of the experiment, but was entirely satisfied that it ought to be tried.<sup>1</sup>

He left Mount Vernon in the latter part of April. Public honors attended him everywhere on his route. At Chester, fifteen miles from the city of Philadelphia, he was met by the Speaker of the Assembly of Pennsylvania and several officers and gentlemen of distinction, who accompanied him to Gray's Ferry, where a military escort was in waiting to receive him and conduct him into the city. On his arrival he immediately paid a visit to Dr. Franklin, at that time President of the State of Pennsylvania.<sup>2</sup>

On the assembling of the Convention, Robert Morris, by the instruction and in behalf of the deputation of Pennsylvania, proposed that General Washington should be elected president. John Rutledge of South Carolina seconded this suggestion, observing that the presence of General Washington forbade any observations on the occasion which might otherwise be proper.<sup>3</sup> His opinions, at the time when he took the chair of the Convention, as to what was proper to be done, and what was practicable, can only be gathered from his correspondence. He had formed some general views of the principles on which a national government should be framed, but he had not proceeded at all to the consider-

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<sup>1</sup> Washington's Writings, IX. 236.

<sup>2</sup> Sparks's Life of Washington, p. 435.

<sup>3</sup> Madison's Debates, Elliot, V. 128.

ation of details. The first and most important object he held to be, to establish such a constitution as would secure and perpetuate the republican form of government, by satisfying the wants of the country and the time, and thus checking all tendency to monarchical ideas. He had come to the Convention, as we have seen, in order that the great experiment of self-government, on which this country had entered at the Revolution, might have a further trial beyond the hazards of the hour. He knew—he had had occasion to know—that the thought of a monarchy, as being necessary to the safety of the country, had been to some extent entertained. There had been those in a former day, in the darkest period of the war, who had proposed to him to assume a crown—men who could possibly have bestowed it upon him, or have assisted him to acquire it—but who met a rebuke which the nature of their proposition and his character should have taught them to expect. There were those in that day who sincerely despaired of republican liberty, and who had allowed themselves to think that some of the royal families of Europe might possibly furnish a sovereign fitted to govern and control the turbulent elements of our political condition. Washington understood the genius and character of the people of this country so well that he held it to be impossible ever to establish that form of government over them without the deepest social convulsions. It was the form of the government against which they had waged a seven years' war; and it was certain that, apart from all questions of theoretical fitness or value, nothing but the most frightful civil disorders, menacing the very existence of society itself, could ever bring them again under its sway.

He was also satisfied that, whatever particular system was to be adopted, it must be one that would create a national sovereignty and give it the means of coercion. What the nature of that coercion ought to be he had not considered; but that obedience to the ordinances of a general government could not be expected, unless it was clothed with the power of enforcing them, all his experience during the war, and all his observation since, had fully satisfied him. He was convinced, also, that powers of a more extensive nature, and which would comprehend other objects, ought to be given to the general government; that Congress should be so placed as to enable and compel them to exert

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their constitutional authority with a firm and steady hand, instead of referring it back to the states. He proposed to adopt no temporizing expedients, but to have the defects of the Confederation thoroughly examined and displayed, and a radical cure provided, whether it were accepted or not. A course of this kind, he said, would stamp wisdom and dignity on their proceedings, and hold up a light which sooner or later would have its influence.<sup>1</sup>

Persuaded that the primary cause of all the public disorders lay in the different state governments, and in the tenacity with which they adhered to their state powers, he saw that incompatibility in the laws of different states and disrespect to the authority of the Union must continue to render the situation of the country weak, inefficient, and disgraceful. The principle with which he entered the Convention, and on which he acted throughout to the end, was, "with a due consideration of circumstances and habits, to form such a government as will bear the scrutinizing eye of criticism, and trust it to the good sense and patriotism of the people to carry it into effect."<sup>2</sup>

The character of Washington as a statesman has, perhaps, been somewhat undervalued, from two causes: one of them being his military reputation, and the other the extraordinary balance of his mind, which presented no brilliant and few salient qualities. Undoubtedly, as a statesman he was not constructive, like Hamilton, nor did he possess the same abundant and ever-ready resources. He was eminently cautious, but he was also eminently sagacious. He had had a wide field of observation during the war, the theatre of which, commencing in New England, had extended through the Middle and into the Southern States. He had, of course, been brought in contact with the men and the institutions of all the states, and had been concerned in their conflicts with the federal authority, to a greater extent than any other public man of the time. This experience had not prepared him—as the character of his mind had not prepared him—to suggest plans or frame institutions fitted to remedy the evils he had observed, and to apply the principles which he had discovered. But it had revealed to him the dangers and difficulties of our situation, and had made him a national statesman as incapable of confining his poli-

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<sup>1</sup> Washington's Writings, IX. 250.

<sup>2</sup> *Ibid.*, 258.

tics to the narrow scale of local interests and attachments as he had been of confining his exertions to the object of achieving the liberties of a single state.

He would have been fitly placed in the chair of any deliberative assembly into which he might have been called at any period of his life, but it was pre-eminently suitable that he should occupy that of the Convention for forming the Constitution. He had no talent for debate, and upon the floor of this body he would have exerted less influence, and have been far less the central object towards which the opinions and views of the members were directed, than he was in the high and becoming position to which he was now called.

Next to the august name of the president should be mentioned Alexander Hamilton.

This eminent person was, for one or two generations after his death, probably less well known to the nation than most of the leading statesmen of the Revolution. There were causes for this in his history. He never attained to that high office which has conferred celebrity on inferior men. The political party of which he was one of the founders and one of the chief leaders became unpopular with the great body of his countrymen before it was extinct. His death, too, at the early age of forty-seven, while it did not leave an unfinished character, left an unfinished career for the contemplation of posterity. In this respect his fate was unlike that of nearly all his most distinguished contemporaries. Washington, Adams, Jefferson, Madison, Jay, and, in fact, almost all the prominent statesmen of the Revolution, died in old age or in advanced life, and after the circle of their public honors and usefulness had been completed. Hamilton was cut off at a period of life when he may be said to have had above a third of its best activity yet before him; and this is doubtless one cause why so little was popularly known of him by subsequent generations.

It was known, indeed, traditionally, what a thrill of horror—what a sharp, terrible pang—ran through the nation, proving the comprehension by the entire people of what was lost, when Aaron Burr took from his country and the world that important life. In the most distant extremities of the Union men felt that one of

the first intellects of the age had been extinguished. From the utmost activity and public consideration, in the fulness of his strength and usefulness, the bullet of a duellist had taken one of the first statesmen in America; a man who, while he had not been without errors, and while his life had not been without mistakes, had served his adopted country, from his boyhood to that hour of her bitter bereavement, with an elevation of purpose and a force of intellect rarely exceeded in her history, and which had caused Washington to lean upon him and to trust him as he trusted and leaned upon no other man, from first to last. The death of such a man, under such circumstances, cast a deep gloom over the face of society; and Hamilton was mourned by his contemporaries with a sorrow founded on a just appreciation of his greatness, and of what they owed to his intellect and character. But by the generations that succeeded he was less intimately known than many of his compatriots, who lived longer, and reached stations which he never occupied.

He was born in the island of Nevis in the year 1757, his mother being a native of that island and his father being a Scotchman. At the age of fifteen, after having been for three years in the counting-house of a merchant at Santa Cruz, he was sent to New York to complete his education, and was entered as a private student in King's (now Columbia) College. At the age of seventeen his political life was already begun; for at that age, and while still at college, he wrote and published a series of essays on the Rights of the Colonies which attracted the attention of the whole country. These essays appeared in 1774, in answer to certain pamphlets on the Tory side of the controversy, and in them Hamilton reviewed and vindicated the whole of the proceedings of the first Continental Congress. There are displayed in these papers a power of reasoning and sarcasm, a knowledge of the principles of government and of the English Constitution, and a grasp of the merits of the whole controversy, that would have done honor to any man at any age, and in a youth of seventeen are wonderful. To say that they evince precocity of intellect gives no idea of their main characteristics. They show great maturity—a more remarkable maturity than has ever been exhibited by any other person, at so early an age, in the same department of thought. They produced, too, a great effect. Their influence in bringing

the public mind to the point of resistance to the mother country was important and extensive.

Before he was nineteen years old Hamilton entered the army as a captain of artillery, and when only twenty, in 1777, he was selected by Washington to be one of his aides-de-camp, with the rank of lieutenant-colonel. In this capacity he served until 1782, when he was elected a member of Congress from the state of New York and took his seat. In 1786 he was chosen a member of the legislature of New York. In 1787 he was appointed as a delegate to the convention which framed the Constitution. In the following year, when only thirty years old, he published, with Madison and Jay, the celebrated essays called "The Federalist," in favor of the form of government proposed by the Convention. In 1788 he became a member of the state convention of New York called to ratify the Constitution, and it was chiefly through his influence that it was adopted in that state. In 1789 he took office in Washington's administration as secretary of the treasury. In 1795 he retired to the practice of the law in the city of New York. In 1798, at Washington's absolute demand, he was appointed second in command of the provisional army, raised under the elder Adams's administration to repel an apprehended invasion of the French. On the death of Washington, in 1799, he succeeded to the chief command. When the army was disbanded he again returned to the bar, and practised with great reputation until the year 1804, when his life was terminated in a duel with Colonel Burr, concerning which the sole blame that has ever been imputed to Hamilton is that he felt constrained to accept the challenge.

His great characteristic was his profound insight into the principles of government. The sagacity with which he comprehended all systems, and the thorough knowledge he possessed of the working of all the freer institutions of ancient and modern times, united with a singular capacity to make the experience of the past bear on the actual state of society, rendered him one of the most useful statesmen that America has known. Whatever in the science of government had already been ascertained; whatever the civil condition of mankind in any age had made practicable or proved abortive; whatever experience had demonstrated; whatever the passions, the interests, or the wants of men had

made inevitable—he seemed to know intuitively. But he was no theorist. His powers were all eminently practical. He detected the vice of a theory instantly, and shattered it with a single blow.

His knowledge, too, of the existing state of his own and of other countries was not less remarkable than his knowledge of the past. He understood America as thoroughly as the wisest of his contemporaries, and he comprehended Europe more completely than any other man of that age upon this continent.<sup>1</sup>

To these characteristics he added a clear, logical power in statement, a vigorous reasoning, a perfect frankness and moral courage, and a lofty disdain of all the arts of a demagogue. His eloquence was distinguished for correctness of language and distinctness of utterance, as well as for grace and dignity.

In theory he leaned decidedly to the Constitution of England as the best form of civil polity for the attainment of the great objects of government. But he was not on that account less a lover of liberty than those who favored more popular and democratic institutions. His writings will be searched in vain for any disregard of the natural rights of mankind, or any insensibility to the blessings of freedom. It was because he believed that those blessings can be best secured by governments in which a change of rulers is not of frequent occurrence that he had so high an estimate of the English Constitution. At the period of the Convention he held that the chief want of this country was a government into which the element of a permanent tenure of office could be largely infused; and he read in the Convention—as an illustration of his views, but without pressing it—a plan by which the executive and the Senate could hold their offices during good behavior.

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<sup>1</sup> At the time when these observations concerning Hamilton were first published (1854) Mr. Ticknor wrote to me as follows: "One day in January, 1819, talking with Prince Talleyrand, in Paris, about his visit to America, he expressed the highest admiration of Mr. Hamilton, saying, among other things, that he had known nearly all the marked men of his time, but that he had never known one, on the whole, equal to him. I was much surprised and gratified with the remark; but still, feeling that, as an American, I was in some sort a party concerned by patriotism in the compliment, I answered with a little reserve that the great military commanders and the great statesmen of Europe had dealt with larger masses and wider interests than he had. 'Mais, monsieur,' the prince instantly replied, 'Hamilton avoit deviné l'Europe.'"

But the idea which has sometimes been promulgated, that he desired the establishment of a monarchical government in this country, is without foundation. At no period of his life did he regard that experiment as either practicable or desirable.

Hamilton's relation to the Constitution is peculiar. He had less direct agency in framing its chief provisions than many of the other principal persons who sat in the Convention, and some of its provisions were not wholly acceptable to him when framed. But the history, which has been detailed in the previous chapters of this work, of the progress of federal ideas, and of the efforts to introduce and establish principles tending to consolidate the Union, has been largely occupied with the recital of his opinions, exertions, and prevalent influence. Beginning with the year 1780, when he was only three-and-twenty years of age, and when he sketched the outline of a national government strongly resembling the one which the Constitution long afterwards established; passing through the term of his service in Congress, when his admirable expositions of the revenue system, the commercial power, and the ratio of contribution, may justly be said to have saved the Union from dissolution; and coming down to the time when he did so much to bring about, first, the meeting at Annapolis, and then the general and final Convention of all the states—the whole period is marked by his wisdom and filled with his power. He did more than any other public man of the time to lessen the force of state attachments, to create a national feeling, and to lead the public mind to a comprehension of the necessity for an efficient national sovereignty.

Indeed, he was the first to perceive and to develop the idea of a real union of the people of the United States. To him, more than to any one else, is to be attributed the conviction that the people of the different states were competent to establish a general government by their own direct action; and that this mode of proceeding ought to be considered within the contemplation of the state legislatures, when they appointed delegates to a convention for the revision and amendment of the existing system.<sup>1</sup>

The age in which he lived, and the very extraordinary early maturity of his character, naturally remind us of that remarkable

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<sup>1</sup> See his first speech in the Convention, as reported by Mr. Madison.

person who was two years his junior, and who became prime-minister of England at the age of twenty-four. The younger Pitt entered public life with almost every possible advantage. Inheriting "a great and celebrated name,"<sup>1</sup> educated expressly for the career of a statesman, and introduced into the House of Commons at a moment when power was just ready to drop into the hands of any man capable of wielding it, he had only to prove himself a brilliant and powerful debater in order to become the ruler of an empire whose Constitution had been settled for ages, and was necessarily administered by the successful leaders of regular parties in its legislative body. That he was a most eminent parliamentary orator, a consummate tactician and leader of party, a minister of singular energy, and a statesman of a very high order of mind and character, at an age when most men are scarcely beginning to give proofs of what they may become—all this history has deliberately and finally recorded. What place it may assign to him among the statesmen by whose lives and action England and the world have been materially and permanently benefited is not yet settled, and it is not to the present purpose to consider.

The theatre in which Hamilton appeared, lived, and acted was one of a character so totally different that the comparison necessarily ends with the contrast which it immediately suggests. Like Pitt, indeed, he seems to have been born a statesman, and to have had no such youth as ordinarily precedes the manhood of the mind. But, in the American colonies, no political system of things existed that was fitted to train him for a career of usefulness and honor; and yet, when the years of his boyhood were hardly ended, he sprang forth into the troubled affairs of the time with the full stature of a matured and well-furnished statesman. He, in truth, showed himself to be already the man that was wanted. Everything was in an unsettled and anxious state—a state of change and transition. There was no regular, efficient government. It was all but a state of civil war, and the more clear-sighted saw that this great disaster was near at hand. He was compelled, therefore, to mark out for himself, step by step, beginning in 1774, a system of political principles which should serve, not to administer existing institutions with wisdom and benefi-

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<sup>1</sup> Burke, speaking of Lord Chatham.

cence, but to create institutions able to unite a people divided into thirteen independent sovereignties; to give them the attitude and capacity of an independent nation; and then to carry them on, with constantly increasing prosperity and power, to their just place in the affairs of the world. It was a great work, but Hamilton was equal to it. He was by nature, by careful study, and by still more careful, anxious, and earnest thought, eminently fitted to detect and develop those resources of power and progress which, in the dark condition of society that attends and follows an exhausting period of revolution, lie hidden, like generous seeds, until some strong hand disencumbers them of the soil with which they had been oppressed, and gives them opportunity to germinate and bear golden fruit. At the age of three-and-twenty he had already formed well-defined, profound, and comprehensive opinions on the situation and wants of these states. He had clearly discerned the practicability of forming a confederated government, and adapting it to their peculiar condition, resources, and exigencies. He had wrought out for himself a political system, far in advance of the conceptions of his contemporaries, and one which, in the hands of those who most opposed him in life, became, when he was laid in a premature grave, the basis on which this government was consolidated; on which, to the present day, it has been administered; and on which alone it can safely rest in that future which seems so to stretch out its unending glories before us.

Hamilton, therefore, I conceive, proved himself early to be a statesman of greater talent and power than the celebrated English minister whose youthful success was in the eyes of the world so much more brilliant, and whose early death was no less disheartening; for none can doubt that to build up a free and firm state out of a condition of political chaos, and to give it a government capable of developing the resources of its soil and people, and of insuring to it prosperity, power, and permanence, is a greater work than to administer with energy and success—even in periods of severe trial—the constitution of an empire whose principles and modes of action have been settled for centuries.

Hamilton was one of those statesmen who trust to the efficacy of the press for the advancement and inculcation of correct principles of public policy, and who desire to accomplish important



results mainly through the action of an enlightened public opinion. That he had faith in the intelligence and honesty of his countrymen is proved by the numerous writings which he constantly addressed to their reason and good sense, in the shape of essays or letters, from the beginning to the end of his career, upon subjects on which it was important that they should act with wisdom and principle.

His own opinions, although held with great firmness, were also held in subordination to what was practicable. It was the rare felicity of his temperament to be able to accept a less good than his principles might have led him to insist upon, and to labor for it, when nothing better could be obtained, with as much patriotic energy and zeal as if it had been the best result of his own views. The Constitution itself remains, in this particular, a monument of the disinterestedness of his character. He thought it had great defects. But he accepted it, as the best government that the wisdom of the Convention could frame, and the best that the nation would adopt. In this spirit, as soon as it was promulgated for the acceptance of the country, he came forward and placed himself in the foremost rank of its advocates, making himself one of the chief of its authoritative expounders. He was very ably assisted in the *Federalist* by Madison and Jay; but it was from him that the *Federalist* chiefly derived the weight and the power which carried conviction to a large body of intelligent men in all parts of the Union. The extraordinary forecast with which its luminous discussions anticipated the operation of the new institutions, and its profound elucidation of their principles, gave birth to American constitutional law, which was thus placed at once above the field of arbitrary constructions and in the domain of legal truth. They made it a science; and so long as the Constitution shall exist, they will continue to be resorted to as the most important sources of contemporaneous interpretation which the annals of the country afford.<sup>1</sup>

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<sup>1</sup> At page 418 of Volume I., first edition of the present volume, I inserted a note on the various editions of the *Federalist*. The introduction to Mr. Henry Cabot Lodge's edition of the *Federalist* (Putnam, New York, 1888) gives an account of twenty-four previous editions, and contains an elaborate and critical examination of all the evidence bearing on the authorship of the different papers. Mr. Lodge's researches have been so exhaustive that, unless further evidence shall

In the two paramount characters of statesman and jurist, in the comprehensive nature of his patriotism, in his freedom from sectional prejudices, in his services to the Union, and in the kind and magnitude of his intellect, posterity will recognize a resemblance to Daniel Webster, who has been to the Constitution, in the age that succeeded, what Hamilton was in the age that witnessed its formation and establishment. Without the one of these illustrious men the Constitution probably would never have existed; without the other, it might have become a mere record of past institutions, whose history had been glorious until faction and civil discord had turned it into a record of mournful recollections.

The following sentences, written by Hamilton soon after the adjournment of the Convention, contain a clew to all his conduct in support of the plan of government which that body recommended: "It may be in me a defect of political fortitude, but I acknowledge that I cannot feel an equal tranquillity with those who affect to treat the dangers of a longer continuance in our present situation as imaginary. A nation without a national government is an awful spectacle. The establishment of a constitu-

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be discovered hereafter, changing his conclusions, they must be considered as final. Out of the total number of the essays (eighty-five), he assigns fifty-one to Hamilton, five to Jay, fourteen to Madison, and three to Hamilton and Madison jointly. The twelve remaining numbers he considers doubtful, but two of them, numbers 62 and 63, he thinks belong to Hamilton. He comes to no confident conclusion respecting the remaining ten, but leaves them in doubt; although he thinks they were certainly written by either Hamilton or Madison. The essays being first printed in the newspapers as they were written, the first edition in book form (McLean, 1788) adopted substantially the same text. Subsequent editions made changes in the text. Mr. Henry B. Dawson, in his edition (the 22d), published in 1863, restored the original text; and by an argument which Mr. Lodge considers "unanswerable," Mr. Dawson vindicated the propriety of this resort to the text as the essays were first published. Mr. Lodge follows the text which Mr. Dawson had thus restored. I suggested more than thirty years ago, that as the *Federalist* was an argument addressed to the people, to convince them that the Constitution ought to be adopted, the text should be given as it was first published. But as I wrote long before Mr. Dawson's edition was published, and had only the Gideon edition of 1818, I had not the benefit of the restored text. I am not aware, however, that I quoted any passages which had been corrupted, or that I assigned the authorship of any essay to the wrong person.

tion, in a time of profound peace, by the voluntary consent of a whole people, is a prodigy, to the completion of which I look forward with trembling anxiety."

From Hamilton we naturally turn to his associate in the *Federalist*—James Madison, afterwards fourth President of the United States, whose faithful and laborious record has preserved to us the debates of the Convention.

Mr. Madison was thirty-six years old when he entered that assembly. His previous life had fitted him to play a conspicuous and important part in its proceedings. He was born in 1751, of a good family, in Orange County, Virginia, and was educated at Princeton College in New Jersey, where he took the degree of Bachelor of Arts in 1772. He returned to Virginia in the spring of 1773, and commenced the usual studies preparatory to an admission to the bar; but the disputes between the colonies and the mother country soon drew him into public life. In 1776 he became a member of the State Convention which formed the first Constitution of Virginia. He was afterwards a member of the legislature and of the Council of the State, until he was appointed one of its delegates in Congress, where he took his seat in March, 1780.<sup>1</sup>

From this time to the assembling of the Federal Convention in 1787, his services to the Union were of the most important character. He entered Congress without a national reputation, but with national views. Indeed, it may be said of him that he came from his native commonwealth—"mother of great men"—grown to the proportions of a continental statesman. At the moment when he appeared upon the larger theatre of the national interests, the Articles of Confederation had not been finally ratified by all the states. Maryland had insisted, as a necessary condition of her accession to the new Confederacy, that the great states should surrender to the Union their immense claims to the unoccupied territories of the West; Virginia had remonstrated against this demand; and the whole scheme of the Confederation had thus been long encountered by an apparently insurmountable

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<sup>1</sup> Article "Madison" in the *Penny Encyclopædia*, written for that work by Professor George Tucker of the University of Virginia.

obstacle.<sup>1</sup> The generous example of New York, whose western claims were ceded to the United States in the month preceding Mr. Madison's entry into Congress, had furnished to the advocates of the Union the means for a powerful appeal to both sides of this critical and delicate controversy; but it required great tact, discretion, and address to make that appeal effectual, by inducing Maryland to trust to the influence of this example upon Virginia, and by inducing Virginia to make a cession that would be satisfactory to Maryland. In this high effort of statesmanship—a domestic diplomacy full of difficulties—Mr. Madison took part. He did not prepare the very skilful report which, while it aimed to produce cessions of their territorial claims by the larger states, appealed to Maryland to anticipate the result;<sup>2</sup> but the vast concession by which Virginia yielded the Northwestern Territory to the Union was afterwards brought about mainly by his exertions.

In 1782 he united with Hamilton in the celebrated report prepared by the latter upon the refusal of the state of Rhode Island to comply with the recommendations of Congress for a duty on imports.<sup>3</sup>

In 1783 he was named first upon a committee with Ellsworth and Hamilton, to prepare an address to the states, urging the adoption of the revenue system which has been described in a previous chapter, and the address was written by him.<sup>4</sup> The great ability and high tone of this paper gave it a striking effect. The object of this plan of revenue was, as we have seen, to fund the national debts, and to make a sufficient provision for their discharge. I have already assigned to it the merit of having preserved the Union from the premature decay that had begun to destroy its vitality;<sup>5</sup> and it may here be added that the statesman whose pen could produce the comprehensive and powerful appeal by which it was pressed upon the states was certain to become one of the chief founders of the Constitution of which the plan itself was the forerunner. It settled the fact that a national unity in dealing with the debts of the Revolution was "necessary to render its fruits a full reward for the blood, the toils, the cares, and the calamities which had purchased them."

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<sup>1</sup> Ante, pp. 90-97.

<sup>2</sup> It was drawn by James Dunne of New York.

<sup>3</sup> Ante, pp. 117, 139-141.

<sup>4</sup> Ante, pp. 118, 119.

<sup>5</sup> Ante, pp. 117, 124-126.

Such were Mr. Madison's most important services in the Congress of the Confederation; but they are, of course, not the whole. A member so able and of such broad and national views must have had a large agency in every important transaction; and accordingly the Journals, during the whole period of his service, bear ample testimony to his activity, his influence, and his zeal.

At the close of the war he retired to Virginia, and during the three following years was a member of the legislature, still occupied, however, with the interests of the Union. His attention was specially directed to the subject of enlarging the powers of Congress over the foreign trade of the country. It is a striking fact, and a proof of the comprehensive character of Mr. Madison's statesmanship, that Virginia, a state not largely commercial, should have taken so prominent a part in the efforts to give the control of commerce to the general government; an object which has justly been regarded as the corner-stone of the Constitution. It arose partly from the accident of her geographical position, which made it necessary for her to aim at something like uniformity of regulation with the other states which bordered upon her contiguous waters; but it is also to be attributed to the enlightened liberality and forecast of her great men, who saw in the immediate necessities of their own state the occasion for a measure of general advantage to the country.

Mr. Madison's first effort was, to procure a declaration by the legislature of Virginia of the necessity for a uniform regulation of the commerce of the states by the federal authority. For this purpose he introduced into the legislature a series of propositions, intended to instruct the delegates of the state in Congress to propose a recommendation to the states to confer upon Congress power to regulate their trade and to collect a revenue from such regulation. This measure, as we have seen, encountered the opposition of those who preferred a temporary to a perpetual and irrevocable grant of such power; and the propositions were so much changed in the Committee of the Whole that they were no longer acceptable to their original friends. The steps which finally led the legislature of Virginia to recommend a general convention of all the states have been detailed in a previous chapter of this work; but it is due to Mr. Madison's connection with this move-

ment, that they should here be recapitulated with reference to his personal agency in the various transactions.

A conflict of jurisdiction between the two states of Virginia and Maryland over the waters which separated them had, in the spring of 1785, led to the appointment of commissioners on the part of each state, who met at Alexandria in March. These commissioners, of whom Mr. Madison was one, made a visit to Washington at Mount Vernon, and it was there proposed that the two states, whose conflicting regulations, ever since the peace, had produced great inconvenience to their merchants, and had been a constant source of irritation, should be recommended by the commissioners to make a compact for the regulation of their impost and foreign trade. Mr. Madison has left no written claim, that I am aware of, to the authorship of this suggestion, but there exists evidence of his having claimed it in conversation.<sup>1</sup> The recommendation was made by the commissioners, and their report was adopted by both states — by Virginia unconditionally, and by Maryland with the qualification that the states of Delaware and Pennsylvania should be invited to unite in the plan.

After the commercial propositions introduced by Mr. Madison had lain on the table for some time as a report from the Committee of the Whole, the report of the Alexandria commissioners was received and ratified by the legislature of Virginia. Although

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<sup>1</sup> In preparing the note to page 280 (ante), I refrained from attributing to Washington the suggestion of the enlarged plan recommended by the Alexandria commissioners, although it was concerted at his house, because there is no evidence, beyond that fact, of his having proposed this enlargement of the plan. Since that note was printed I have learned in a direct manner that Mr. Madison had stated to the Hon. Edward Coles, formerly his private secretary and afterwards governor of Illinois, that he (Mr. Madison) first suggested it. In assigning, therefore, to the different individuals who took a prominent part in the measures which led to the formation of the Constitution, the various suggestions which had an important influence upon the course of events—a curious and interesting inquiry—I consider that to Mr. Madison belongs the credit of having originated that series of Virginia measures which brought about the meeting of commissioners of all the states at Annapolis, for the purpose of enlarging the powers of Congress over commerce; while Hamilton is to be considered the author of the plan in which the Convention at Annapolis was merged, for an entire revision of the federal system and the formation of a new constitution.

the friends of those propositions were gradually increasing, Mr. Madison had no expectation that a majority could be obtained in favor of a grant of commercial powers to Congress for a longer term than twenty-five years. The idea of a general convention of delegates from all the states, which had been for some time familiar to Mr. Madison's mind, then suggested itself to him, and he prepared and caused to be introduced the resolution which led to the meeting that afterwards took place at Annapolis, for the purpose of digesting and reporting the requisite augmentation of the powers of Congress over trade.<sup>1</sup> His resolution, he says, being, on the last day of the session, "the alternative of adjourning without any effort for the crisis in the affairs of the Union, obtained a general vote; less, however, with some of its friends, from a confidence in the success of the experiment, than from a hope that it might prove a step to a more comprehensive and adequate provision for the wants of the Confederacy."

Mr. Madison was appointed one of the commissioners of Virginia to the meeting at Annapolis. There he met Hamilton, who came meditating nothing less than the general revision of the whole system of the Federal Union, and the formation of a new government. Mr. Madison, although less confident than the great statesman of New York as to the measures that ought to be taken, had yet for several years been equally convinced that the perpetuity and efficacy of the existing system could not be confided in. He therefore concurred readily in the report recommending a general convention of all the states; and when that report was received in the legislature of Virginia, he became the author of the celebrated act which passed that body on the 4th of December, 1786, and under which the first appointment of delegates to the Convention was made. It was chiefly through his exertions, combined with the influence of Governor Randolph, that Washington's name was placed at the head of the delegation,

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<sup>1</sup> The resolve was introduced by Mr. Tyler, father of President Tyler, a person of much influence in the legislature, and who had never been in Congress. Although prepared by Mr. Madison, it was not offered by him, for the reason that a great jealousy was felt against those who had been in the federal councils, and because he was known to wish for an enlargement of the powers of Congress. See Madison's Introduction to the Convention, Elliot, V. 113.

<sup>2</sup> Ibid., p. 114.

and that he was induced to accept the appointment. Mr. Madison himself was the fourth member of the delegation.

In the convention his labors must have been far more arduous than those of any other member of the body. He took a leading part in the debates, speaking upon every important question; and in addition to all the usual duties devolving upon a person of so much ability and influence, he preserved a full and careful record of the discussions with his own hand. Impressed, as he says, with the magnitude of the trust confided to the Convention, and foreseeing the interest that must attach to an authentic exhibition of the objects, the opinions, and the reasonings from which the new system of government was to receive its peculiar structure and organization, he devoted the hours of the night succeeding the session of each day to the preparation of the record with which his name is imperishably associated. "Nor was I," he added, "unaware of the value of such a contribution to the fund of materials for a Constitution on which would be staked the happiness of a people, great even in its infancy, and possibly the cause of liberty throughout the world."<sup>1</sup>

As a statesman he is to be ranked, by a long interval, after Hamilton; but he was a man of eminent talent, always free from local prejudices, and sincerely studious of the welfare of the whole country. His perception of the principles essential to the continuance of the Union and to the safety and prosperity of the states, was accurate and clear. His studies had made him familiar with the examples of ancient and modern liberty, and he had carefully reflected upon the nature of the government necessary to be established. He was one of the few persons who carried into the Convention a conviction that an amendment of the Articles of Confederation would not answer the exigencies of the time. He regarded an individual independence of the states as irreconcilable with an aggregate sovereignty of the whole, but admitted that a consolidation of the states into a simple republic was both impracticable and inexpedient. He sought, therefore, for some middle ground which would at once support a due supremacy of the national authority and leave the local authorities in force for their subordinate objects.

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<sup>1</sup> Introduction to the Debates, Elliot, V. 121.



For this purpose he conceived that a system of representation which would operate without the intervention of the states was indispensable; that the national government should be armed with a positive and complete authority in all cases where a uniformity of measures was necessary, as in matters of trade, and that it should have a negative upon the legislative acts of the states, as the crown of England had before the Revolution. He thought, also, that the national supremacy should be extended to the judiciary, and foresaw the necessity for national tribunals, in cases in which foreigners and citizens of different states might be concerned, and also for the exercise of the admiralty jurisdiction. He considered two branches of the legislature, with distinct origins, as indispensable; recognized the necessity for a national executive, and favored a council of revision of the laws, in which should be included the great ministerial officers of the government. He saw, also, that to give the new system its proper energy, it would be necessary to have it ratified by the authority of the people, and not merely by that of the legislatures.<sup>1</sup>

Such was the outline of the project which he had formed before the assembling of the Convention. How far his views were modified by the discussions in which he took part will be seen hereafter. As a speaker in a deliberative assembly, the successive schools in which he had been trained had given him a habit of self-possession which placed all his resources at his command. "Never wandering from his subject," says Mr. Jefferson, "into vain declamation, but pursuing it closely, in language pure, classical, and copious, soothing always the feelings of his adversaries by civilities and softness of expression, he rose to the eminent station which he held in the great national Convention of 1787; and in that of Virginia which followed he sustained the new Constitution in all its parts, bearing off the palm against the logic of George Mason and the fervid declamation of Mr. Henry. With these consummate powers were united a pure and spotless virtue, which no calumny has ever attempted to sully."<sup>2</sup>

Mr. Madison's greatest service in the national Convention consisted in the answers which he made to the objections of a want

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<sup>1</sup> Letter to Edmund Randolph, dated New York, April 8th, 1787.

<sup>2</sup> Jefferson's Autobiography, Works, I. 41, edition of 1853.

of power in that assembly to frame and propose a new constitution, and his paper on this subject in the *Federalist* is one of the ablest in the series.

It will be necessary for me hereafter to examine those points on which the two principal writers of the *Federalist* became separated from each other, when the administration of the government led to the formation of the first parties known in our political history.<sup>1</sup> But it may here be said of them that, upon almost all

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<sup>1</sup> The following extract from an autograph letter of Mr. Madison, hitherto unpublished, which lies before me, written after the adoption of the Constitution, shows very clearly that he concurred with Hamilton in the opinion that the strongest government consistent with the republican form was necessary in the situation of this country. The letter is dated at Philadelphia, December 10th, 1788, and is addressed to Philip Mazzei, at Paris.

"Your book, as I prophesied, sells nowhere but in Virginia; a very few copies only have been called for, either in New York or in this city. The language in which it is written will account for it. In order to attract notice, I translated the panegyric in the French *Mercure*, and had it made part of the advertisement. I did not translate the comment on the Federal Constitution, as you wished, because I could not spare the time, as well as because I did not approve the tendency of it. Some of your remarks prove that Horace's '*Calum non animum mutant qui trans mare currunt*' does not hold without exception. In Europe, the abuses of power continually before your eyes have given a bias to your political reflections which you did not feel in equal degree when you left America, and which you would feel less of if you had remained in America. Philosophers on the old continent, in their zeal against tyranny would rush into anarchy; as the horrors of superstition drive them into atheism. Here, perhaps, the inconveniences of relaxed government have reconciled too many to the opposite extreme. If your plan of a single legislature, as in Pennsylvania, etc., were adopted, I sincerely believe that it would prove the most deadly blow ever given to republicanism. Were I an enemy to that form, I would preach the very doctrines which are preached by the enemies of the government proposed for the United States. Many of our best citizens are disgusted with the injustice, instability, and folly which characterize the American administrations. The number has for some time been rapidly increasing. Were the evils to be much longer protracted, the disgust would seize citizens of every description.

"It is of infinite importance to the cause of liberty to ascertain the degree of it which will consist with the purposes of society. An error on one side may be as fatal as on the other. Hitherto, the error in the United States has lain in the excess.

"All the states, except North Carolina and Rhode Island, have ratified the proposed Constitution. Seven of them have appointed their senators, of whom

the great questions that arose before the Constitution was finally adopted, the single purpose of establishing a system as efficient as the theory of a purely republican government would admit was the object of their efforts; and that, although they may have differed with regard to the details and methods through which this object was to be reached, the purpose at which they both aimed places them at the head of those founders of our government towards whom the gratitude of the succeeding generations of America must be forever directed.

The convention was graced and honored by the venerable presence of Dr. Franklin, then President of the State of Pennsylvania, and in his eighty-second year. He had returned from Europe only two years before, followed by the admiration and homage of the social, literary, and scientific circles of France; laden with honors, which he wore with a plain and shrewd simplicity; and in the full possession of that predominating common-sense which had given him, through a long life, a widely extended reputation of a peculiar character. The oldest of the public men of America, his political life had embraced a period of more than half a century, extending back to a time when independence had not entered into the dreams of the boldest among the inhabitants of the English colonies. For more than twenty years before the Revolution commenced, he had held a high and responsible office

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those of Virginia, R. H. Lee and Colonel Grayson, alone are among the opponents of the system. The appointments of Maryland, South Carolina, and Georgia will pretty certainly be of the same stamp with the majority. The House of Representatives is yet to be chosen, everywhere except in Pennsylvania. From the partial returns received, the election will wear a federal aspect unless the event in one or two particular counties should contradict every calculation. If the eight members from this state be on the side of the Constitution, it will in a manner secure the majority in that branch of the Congress also. The object of the anti-Federalists is to bring about another general convention, which would either agree on nothing, as would be agreeable to some, and throw everything into confusion, or expunge from the Constitution parts which are held by its friends to be essential to it. The latter party are willing to gratify their opponents with every supplemental provision for general rights, but insist that this can be better done in the mode provided for amendments.

"I remain, with great sincerity, your friend and servant,

"JAS. MADISON, JR."

under the crown, the administration of which affected the intercourse and connection of all the colonies;<sup>1</sup> and more than twenty years before the first Continental Congress was assembled, he had projected a plan of union for the thirteen provinces which then embraced the whole of the British dominions in North America.<sup>2</sup> Nearly as long, also, before the Declaration of Independence, he had become the resident agent in England of several of the colonies, in which post he continued, with a short interval, through all the controversies that preceded the Revolution, and until reconciliation with the mother country had become impossible.<sup>3</sup>

Returning in 1775, he was immediately appointed by the people of Pennsylvania one of their delegates in the second Continental Congress. In the following year he was sent as commissioner to France, where he remained until he was recalled, and was succeeded by Mr. Jefferson in 1785.

With the fame of his two residences abroad—the one before and the other after the country had severed its connection with England—the whole land was filled. The first of them, commencing with an employment for settling the miserable disputes between the people and the proprietaries of Pennsylvania, was extended to an agency for the three other colonies of Georgia, New Jersey, and Massachusetts, which finally led him to take part in the affairs of all British America, and made him virtually the representative of American interests. His brief service in Congress, during which he signed the Declaration of Independence, was followed by his appointment as commissioner at the court of Versailles, which he made the most important sphere that has

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<sup>1</sup> In 1753 he was appointed deputy postmaster-general for the British colonies, from which place he was dismissed in 1774, while in England, on account of the part he had taken in American affairs.

<sup>2</sup> In 1754. See an account of this plan, ante, p. 4.

<sup>3</sup> He first went to England in 1757, as agent of the Pennsylvania Assembly to settle their difficulties with the proprietaries, where he remained until 1762. In 1764 he was reappointed provincial agent in England for Pennsylvania; in 1768 he received a similar appointment from Georgia; in 1769 he was chosen agent for New Jersey; and in 1770 he became agent for Massachusetts. His whole residence in England, from 1757 to 1775, embraced a period of sixteen years, two years having been passed at home. He resided in France about nine years, from 1776 to 1785.

ever been filled by any American in Europe, and in which that treaty of alliance with France was negotiated which enabled the United States to become in fact an independent nation.

His long career of public service; his eminence as a philosopher, a philanthropist, and a thinker; the general reverence of the people for his character; his peculiar power of illustrating and enforcing his opinions by a method at once original, simple, and attractive—made his presence of the first importance in an assembly which was to embrace the highest wisdom and virtue of America.

It is chiefly, however, by the countenance he gave to the effort to frame a constitution that his services as a member of this body are to be estimated. His mind was at all times ingenious, rather than large and constructive; and his great age, while it had scarcely at all impaired his natural powers, had confirmed him in some opinions which must certainly be regarded as mistaken. His desire, for example, to have the legislature of the United States consist of a single body, for the sake of simplicity, and his idea that the chief executive magistrate ought to receive no salary for his official services, for the sake of purity, were both singular and unsound.

But there were points upon which he displayed extraordinary wisdom, penetration, and forecast. When an objection to a proportionate representation in Congress was started, upon the ground that it would enable the larger states to swallow up the smaller, he declared that, as the great states could propose to themselves no advantage by absorbing their inferior neighbors, he did not believe they would attempt it. His recollection carried him back to the early part of the century, when the union between England and Scotland was proposed, and when the Scotch patriots were alarmed by the idea that they should be ruined by the superiority of England unless they had an equal number of members in Parliament; and yet, notwithstanding the great inferiority in their representation as established by the act of union, he declared that, down to that day, he did not recollect that anything had been done in the Parliament of Great Britain to the prejudice of Scotland.<sup>1</sup>

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<sup>1</sup> He added, with his usual quiet humor, that "whoever looks over the lists of public officers, civil and military, of that nation, will find, I believe, that

Although he spoke but seldom in the Convention, his influence was very great, and it was always exerted to cool the ardor of debate, and to check the tendency of such discussions to result in irreconcilable differences. His great age, his venerable and benignant aspect, his wide reputation, his acute and sagacious philosophy—which was always the embodiment of good sense—would have given him a controlling weight in a much more turbulent and a far less intelligent assembly. When—after debates in which the powerful intellects around him had exhausted the subject, and both sides remained firm in opinions diametrically opposed—he rose and reminded them that they were sent to consult and not to contend, and that declarations of a fixed opinion and a determination never to change it neither enlightened nor convinced those who listened to them, his authority was felt by men who could have annihilated any mere logical argument that might have proceeded from him in his best days.

Dr. Franklin was one of those who entertained serious objections to the Constitution, but he sacrificed them before the Convention was dissolved. Believing a general government to be necessary for the American States; holding that every form of government might be made a blessing to the people by a good administration; and foreseeing that the Constitution would be well administered for a long course of years, and could only end in despotism when the people should have become so corrupted as to be incapable of any other than a despotic government, he gladly embraced a system which he was astonished to find approaching so near to perfection.

“The opinions I have had of its errors,” said he, “I sacrifice to the public good. Within these walls they were born, and here they shall die. If every one of us, in returning to our constituents, were to report the objections he has had to it, and endeavor to gain partisans in support of them, we might prevent its being generally received, and thereby lose all the salutary effects and great advantages resulting naturally in our favor, among foreign nations as well as among ourselves, from our real or apparent unanimity. Much of the strength and efficiency of any govern-

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the North Britons enjoy their full proportion of emolument.” Madison, Elliot, V. 179.

ment in procuring and securing happiness to the people depends on opinion—on the general opinion of the goodness of the government, as well as of the wisdom and integrity of its governors. I hope, therefore, that for our own sakes as a part of the people, and for the sake of posterity, we shall act heartily and unanimously in recommending this Constitution (approved by Congress and confirmed by the conventions) wherever our influence may extend, and turn our future thoughts and endeavors to the means of having it well administered.”<sup>1</sup>

And thus, with a cheerful confidence in the future, sustaining the hopes of all about him, and hailing every omen that foretold the rising glories of his country, this wise old man passed out from the assembly, when its anxious labors had been brought to a close with a nearer approach to unanimity than had ever been expected. He lived, borne down by infirmities,

“To draw his breath in pain”

for nearly three years after the Convention was dissolved; but it was to see the Constitution established, to witness the growing strength of the new government, and to contemplate the opening successes and the beneficent promise of Washington’s administration. Writing to the first president in 1789, he said: “For my own personal ease, I should have died two years ago; but though those years have been spent in excruciating pain, I am pleased that I have lived them, since they have brought me to see our present situation.”<sup>2</sup>

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<sup>1</sup> Madison. Elliot, V. 554.

<sup>2</sup> Mr. Madison has recorded the following anecdote at the end of the Debates, as an incident worthy of being known to posterity. “Whilst the last members were signing, Dr. Franklin, looking towards the president’s chair, at the back of which a rising sun happened to be painted, observed to a few members near him, that painters had often found it difficult, in their art, to distinguish a rising from a setting sun. ‘I have,’ said he, ‘often and often, in the course of the session, and the vicissitude of my hopes and fears as to its issue, looked at that behind the president, without being able to tell whether it was rising or setting; but now, at length, I have the happiness to know that it is a rising and not a setting sun.’”

<sup>3</sup> Sparks’s Life of Franklin, p. 528.

Gouverneur Morris, a brilliant, energetic, and patriotic statesman, was born in the province of New York, at Morrisania—the seat of his family for several generations—in the year 1752. He was educated for the bar; but in 1775, at the age of three-and-twenty, he was elected a member of the Provincial Congress of New York, in which he became at once distinguished. When the recommendation of the Continental Congress to the colonies to organize new forms of government was received, he took a leading part in the debates on the formation of a new constitution for the state; and when the subject of independence was brought forward, in order that the delegates of New York in the Continental Congress might be clothed with sufficient authority, he delivered a speech of great power, of which fragments only are preserved, but which evidently embraced the most comprehensive and statesman-like views of the situation and future prospects of this country. Speaking of the capacity of America to sustain herself without a connection with Great Britain, he said:

“Thus, sir, by means of that great gulf which rolls its waves between Europe and America; by the situation of these colonies, always adapted to hinder or interrupt all communication between the two; by the productions of our soil, which the Almighty has filled with every necessary to make us a great maritime people; by the extent of our coasts and those immense rivers, which serve at once to open a communication with our interior country, and to teach us the arts of navigation; by those vast fisheries, which, affording an inexhaustible mine of wealth and a cradle of industry, breed hardy mariners, inured to danger and fatigue; finally, by the unconquerable spirit of freemen, deeply interested in the preservation of a government which secures to them the blessings of liberty and exalts the dignity of mankind—by all these, I expect a full and lasting defence against any and every part of the earth; while the great advantages to be derived from a friendly intercourse with this country almost render the means of defence unnecessary, from the great improbability of being attacked. So far, peace seems to smile upon our future independence. But that this fair goddess will equally crown our union with Great Britain, my fondest hopes cannot lead me to suppose. Every war in which she is engaged must necessarily involve us in its detestable consequences; while, weak and unarmed, we have no shield



of defence, unless such as she may please (for her own sake) to afford, or else the pity of her enemies and the insignificance of slaves beneath the attention of a generous foe."<sup>1</sup>

In 1778 Mr. Morris was chosen a delegate to the Continental Congress from the state of New York. His reputation for talent, zeal, activity, and singular capacity for business had preceded him. On the day when he presented his credentials he was placed upon a committee to proceed to Valley Forge, to confer with Washington on the measures necessary for a reorganization of the army. He remained in Congress for two years, discharging, with great ability and high patriotism, the most important functions, and subjected all the while to the most unjust popular suspicions of his fidelity to the cause of the country. Few of all the prominent men of the Revolution sacrificed or suffered more than Gouverneur Morris. The fact that all the other members of his family adhered to the Royalist side, and an ineffectual effort which he once made to visit his mother at his ancestral home, then within the British lines, gave his enemies the means of inflicting upon him a deep injury in the popular estimation. He was not re-elected to Congress; but short as his career in that body was, it was filled with services inferior to those of none of his associates.

Before he left Congress, in February, 1779, he made—as chairman of a committee to whom certain communications from the French minister to the United States were referred—a report which became the basis of the peace that afterwards followed; and when the principles on which the peace was to be negotiated had been settled, he drew the instructions to the commissioners, and they were unanimously adopted without change.<sup>2</sup>

On leaving Congress, Mr. Morris took up his residence in Philadelphia, and resumed the practice of the law. His remarkable

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<sup>1</sup> Sparks's *Life of G. Morris*, I. 103. The florid and declamatory style of this speech belongs to the period and to the youth of the speaker. The breadth of its views and its vigor of thought display the characteristics which belonged to him through life. He had a prophetic insight of the future resources of this country, and made many remarkable predictions of its greatness. His biographer has claimed for him the suggestion of the plan for uniting the waters of Lake Erie with those of the Hudson, and upon very strong evidence.

<sup>2</sup> See the Report and the debates thereon, *Secret Journals*, II. 132 et seq.

talent for business, however, and his intimate knowledge of financial subjects, led to his appointment as assistant financier with Robert Morris. In this capacity he suggested the idea of the decimal notation, which was afterwards made the basis of the coinage of the United States.<sup>1</sup>

Having been appointed one of the delegates from the state of Pennsylvania to the Convention for forming the Constitution of the United States, Mr. Morris attended the whole session, with the exception of a few days in June, and entered into its business with his accustomed ardor. To remove impediments, obviate objections, and conciliate jarring opinions, he exerted all his fine faculties, and employed his remarkable eloquence. But he is chiefly to be remembered in connection with the Constitution as the author of its text. To his pen belongs the merit of that clear and finished style—that *lucidus ordo*—that admirable perspicuity which have so much diminished the labors and hazards of interpretation for all future ages.<sup>2</sup>

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<sup>1</sup> In January, 1782, the financier made a report, which was officially signed by him, but which Mr. Jefferson says was prepared by his assistant, Gouverneur Morris. It embraced an elaborate statement of the denominations and comparative value of the foreign coins in circulation in the different states, and proposed the adoption of a money unit and a system of decimal notation for a new coinage. The unit suggested was such a portion of pure silver as would be a common measure of the penny of every state without leaving a fraction. This common divisor Mr. Morris found to be  $\frac{1}{1440}$  of a dollar, or  $\frac{1}{1600}$  of the crown sterling. The value of a dollar was therefore to be expressed by 1440 units, and that of a crown by 1600, each unit containing a quarter of a grain of fine silver. Nothing, however, was done until 1784, when Mr. Jefferson, being in Congress, took up the subject. He approved of Mr. Morris's general views and his method of decimal notation, but objected to his unit as too minute for ordinary use. Mr. Jefferson proposed the dollar as the unit of account and payment, and that its divisions and subdivisions should be in the decimal ratio. This plan was adopted in August, 1785, and in 1786 the names and characters of the coins were determined. The ordinance establishing the coinage was passed August 8, 1786, and that establishing the mint on the 16th of October, in the same year. Jefferson's Autobiography, Works, I. 52-54. Life of Gouverneur Morris, I. 278. Journals of Congress, XI. 179, 254.

<sup>2</sup> The materials for the final preparation of the instrument, consisting of a reported draft in detail and the various resolutions which had been adopted, were placed in the hands of a committee of revision, of which Dr. William Samuel Johnson of Connecticut was the chairman; the other members being

The character of Gouverneur Morris was balanced by many admirable qualities. His self-possession was so complete in all circumstances that he is said to have declared that he never knew the sensation of fear, inferiority, or embarrassment in his intercourse with men. Undoubtedly his self-confidence amounted sometimes to boldness and presumption; but we have it on no less an authority than Mr. Madison's, that he added to it a candid surrender of his opinions when the lights of discussion satisfied him that they had been too hastily formed.<sup>1</sup> He was a man of genius, fond of society and pleasure, but capable of prodigious exertion and industry, and possessed of great powers of eloquence.

He liked to indulge in speculations on the future condition of the country, and often foresaw results which gave him patience under the existing state of things. In 1784, writing to Mr. Jay, at a time when the clashing commercial regulations of the states seemed about to put an end to the Union, he said: "True it is, that the general government wants energy, and equally true it is, that this want will eventually be supplied. A national spirit is the natural result of national existence, and although some of the present generation may feel colonial oppositions of opinion, yet this generation will die away and give place to a race of Americans."<sup>2</sup>

He was himself at all times an American, and never more so than during the discussions of the Convention. Appealing to his colleagues to extend their views beyond the narrow limits of place whence they derived their political origin, he declared, with his characteristic energy and point, that state attachments and state importance had been the bane of this country. "We cannot annihilate," said he, "but we may perhaps take out the teeth of the serpents."<sup>3</sup>

In truth, the circumstances of his life had prevented him from feeling those strong local attachments which he considered the great impediments to the national prosperity. Born in one state,

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Messrs. Hamilton, Gouverneur Morris, Madison, and King. The chairman committed the work to Mr. Morris, and the text of the Constitution, as adopted, was prepared by him. See Mr. Madison's letter to Mr. Sparks, *Life of Gouverneur Morris*, I. 284. *Madison's Debates*, Elliot, V. 580.

<sup>1</sup> *Life of Morris*, I. 284-286.

<sup>2</sup> *Ibid.*, 286.

<sup>3</sup> *Madison*, Elliot, V. 276, 277.

he had then resided for seven years in another, from whose inhabitants he had received at least equal marks of confidence with those that had been bestowed upon him by the people among whom he first entered public life.

In his political opinions he probably went further in opposition to democratic tendencies than any other person in the Convention. He was in favor of an executive during good behavior, of a Senate for life, and of a freehold qualification for electors of representatives. In several other respects the Constitution, as actually framed, was distasteful to him; but, like many of the other eminent men who doubted its theoretical or practical wisdom, he determined at once to abide by the voice of the majority. He saw that, as soon as the plan should go forth, all other considerations ought to be laid aside, and the great question ought to be, Shall there be a national government or not? He acknowledged that the alternatives were, the adoption of the system proposed, or a general anarchy—and before this single and fearful issue all questions of individual opinion or preference sank into insignificance.<sup>1</sup> It is a proof both of his sincerity and of the estimate in which his abilities were held that, when this great issue was presented to the people, he was invited by Hamilton to become one of the writers of the *Federalist*.<sup>2</sup> It is not known why he did not embrace the opportunity of connecting himself with that celebrated publication; but his correspondence shows that it was from no want of interest in the result. He took pains to give to Washington his decided testimony, from personal observation, that the idea of his refusing the presidency would, if it prevailed, be fatal to the Constitution in many parts of the country.<sup>3</sup>

Mr. Morris filled two important public stations after the adoption of the Constitution. He was the first minister to France appointed by General Washington, and filled that office from May, 1792, until August, 1794. In February, 1800, he was chosen by the legislature of New York to supply a vacancy in the Senate of the United States, which he filled until the 4th of March, 1803. He died at Morrisania on the 6th of November, 1818. "Let us forget party," said he, "and think of our country, which embraces all parties."<sup>4</sup>

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<sup>1</sup> Madison, Elliot, V. 556.    <sup>2</sup> Life, I. 287.    <sup>3</sup> Ibid., 288-290.    <sup>4</sup> Ibid., 517.

Rufus King, distinguished as a jurist, a statesman, an orator, and a diplomatist, was sent to the Convention by the commonwealth of Massachusetts. Born in her district of Maine, in 1755, and graduated at Harvard College in 1777, he came very early into public life, and was rarely out of it until his death, which occurred in 1827, in the seventy-third year of his age.

His first public service was in the year 1778, as a volunteer in the expedition against the British in Rhode Island, in which he acted as aide-de-camp to General Sullivan. In 1780 he commenced the practice of the law in the town of Newburyport, and was soon after elected from that town to the legislature of the state. There he distinguished himself by a very powerful speech in favor of granting to the general government the five per cent. impost recommended by Congress as part of the revenue system of 1783.

He was soon after elected a member of Congress from Massachusetts, in which body he took his seat on the 6th of December, 1784, and served until the close of the year 1787. He was thus a member both of the Convention for forming the Constitution and of the Congress which sanctioned and referred it to the people. He was also a member of the Convention of Massachusetts, in which the Constitution was ratified by that state.

Mr. King did not favor the plan of a convention for the revision of the federal system until after the meeting at Annapolis had been held; and, indeed, he did not concur in its expediency until after the troubles in Massachusetts had made its necessity apparent. In 1785, as we have seen, he joined with the other members of the Massachusetts delegation in opposing it.<sup>1</sup> In the autumn of 1786, when the report of the Annapolis Convention was before Congress, he expressed the opinion, in person, to the legislature of Massachusetts, that the Articles of Confederation could not be altered except by the consent of Congress and the confirmation of the several legislatures; that Congress ought, in the first instance, to make the examination of the federal system, since, if it was done by a convention, no legislature would have a right to confirm it; and, further, that if Congress should reject the report of a convention the most fatal consequences might follow. For these

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<sup>1</sup> Ante, p. 228, note.

reasons he at that time held Congress to be the proper body to propose alterations.<sup>1</sup>

At the moment when he was making this address to the legislature the disturbances in Massachusetts were fast gathering into that formidable insurrection which two months afterwards burst forth in the interior of the state.<sup>2</sup> Mr. King spoke of these commotions in grave and pointed terms. He told the legislature that Congress viewed them with deep anxiety; that every member of the national councils felt his life, liberty, and property to be involved in the issue of their decisions; that the United States would not be inactive on such an occasion, for, if the lawful authority of the state were to be prostrated, every other government would eventually be swept away. He entreated them to remember that, if the government were in a minority in the state, they had a majority of every state in the Union to join them.<sup>3</sup>

He returned to Congress immediately. But there he found that the reliance which he had placed upon the ability of the Confederation to interfere and suppress such a rebellion was not well founded. The power was even doubted, or denied, by some of the best statesmen in that body; and although the insurrection was happily put down by the government of the state itself, the fearful exposure of a want of external power adequate to such emergencies produced in Mr. King, as in many others, a great change of views, both as to the necessity for a radical change of the national government and as to the mode of effecting it. His vote, in February, was given to the proposition introduced by the delegation of New York for a national convention; and when that failed he united with his colleague, Mr. Dane, in bringing forward the resolution by which the Convention was finally sanctioned in Congress.<sup>4</sup>

The Convention having been sanctioned by Congress, no man was more ready than Mr. King to maintain its power to deliberate on and propose any alterations that Congress could have suggested in the Federal Articles. He held that the proposing of an entire

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<sup>1</sup> Mr. King, being in Boston in October, 1786, was desired by the legislature to attend and give an account of the state of national affairs. For an abstract of his address, see *Boston Magazine* for the year 1786, p. 406.

<sup>2</sup> Ante, p. 180 et seq.

<sup>3</sup> Ibid.

<sup>4</sup> Journals, XII. 15-17.

change in the mode of suffrage in the national legislature, from a representation of the states alone to a representation of the people, was within the scope of their powers, and consistent with the Union; for if that Union, on the one hand, involved the idea of a confederation, on the other hand it contained also the idea of consolidation, from which a national character resulted to the individuals of whom the states were composed. He doubted the practicability of annihilating the state governments, but thought that much of their power ought to be taken from them.<sup>1</sup> He declared that, when every *man* in America might be secured in his rights by a government founded on equality of representation, he could not sacrifice such a substantial good to the phantom of *state* sovereignty. If this illusion were to continue to prevail, he should be prepared for any event, rather than sit down under a government founded on a vicious principle of representation, and one that must be as short-lived as it would be unjust.<sup>2</sup>

There is one feature of the Constitution with which the name of Mr. King should always be connected, and of which he may be said, indeed, to have been the author. Towards the close of the session he introduced the prohibition on the states to pass laws affecting the obligation of contracts. The Ordinance for the government of the Northwestern Territory, which had been passed by Congress about a month previous, contained a similar prohibition on the states to be formed out of that territory. That any of the jurists who were concerned in the framing of either instrument foresaw at the moment all the great future importance and extensive operation of this wise and effective provision we are not authorized to affirm. But a clause which has enabled the supreme national judicature to exercise a vast, direct, and uniform influence on the security of property throughout all the states of this Confederacy should be permanently connected with the names of its authors.<sup>3</sup>

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<sup>1</sup> Madison, Elliot, V. 212, 218.

<sup>2</sup> Ibid., 266.

<sup>3</sup> The ordinance for the government of the Northwestern Territory was in Congress July 11th, 1787, and was passed July 13th. The committee by whom it was reported were Messrs. Carrington and R. H. Lee of Virginia, Kearney of Delaware, Smith of New York, and Mr. Dane. The clause relating to contracts was in these words: "And in the just preservation of rights and property, it is understood and declared, that no law ought ever to be made or have force in the

Mr. King was but little past the age of thirty when the Constitution was adopted. After that event he went to reside in the city of New York, and entered upon the career of distinction which filled up the residue of his life as a senator in Congress and as minister to England. No formal biography of him has yet appeared, but when that duty shall have been discharged by those to whom it appropriately belongs, there will be added to our literature an account of a man of the most eminent abilities and the purest patriotism, whose influence and agency in the great transactions which attended the origin and first operations of the government were of the utmost importance.

Charles Cotesworth Pinckney of South Carolina, the eldest son of a chief-justice of that colony, distinguished both as a soldier and a civilian, was educated in England, and read law at the Temple. He returned to his native province in 1769, and commenced the practice of his profession, which, like many other of the young American barristers of that day, he was obliged to abandon for the duties of the camp when the troubles of the Revolution began. He became colonel of the first regiment of the Carolina infantry, and served under General Moultrie in the defence of the fort on Sullivan's Island. This gallant resistance having freed the South for a time from invasion, Pinckney repaired to the Northern army, and was made aide-de-camp to Washington, in which capacity he served at the battles of the Brandywine and Germantown. He afterwards acquired great distinction in the defence of South Carolina against the British under Sir Henry Clinton.

On the return of peace he devoted himself to the law, in which he became eminent. He belonged to that school of public men who had been trained in the service of the country under the eye of Washington, and who had experienced with him the fatal de-

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said territory that shall in any manner whatever interfere with or affect private contracts or engagements, *bona fide* and without fraud previously formed." On the 28th of August Mr. King moved in the Convention to insert the same clause in the Constitution; but it was opposed, and was not finally adopted until September 14, when it was incorporated in the phraseology in which it now stands in the Constitution. Madison, Elliot, V. 485; Journal of the Convention, Elliot, I. 311. See Appendix, on the Authorship of the Ordinance.



fects of the successive governments which followed the Declaration of Independence. Of his abilities, patriotism, and purity of character we have the strongest evidence in the repeated efforts made by Washington, after the establishment of the Constitution, to induce him to accept some of the most important posts in the government.

He was, indeed, one of that order of men to whom Washington gave his entire confidence from the first. A ripe scholar, a profound lawyer, with Revolutionary laurels of the most honorable kind—wise, energetic, and disinterested—it is not singular that the people of South Carolina should have selected him as one of their delegates to an assembly which was to frame a new constitution of government for the country to whose service his earlier years had been devoted.

General Pinckney entered the Convention with a desire to adhere, if possible, to the characteristic principles of the Confederation, but also with the wish to make that government more effective by giving to it distinct departments and enlarged powers.<sup>1</sup> But in the progress of the discussions he surrendered these views, and became a party to those arrangements by which mutual concessions between the opposing sections of the Union made a different form of government a practicable result.

He was a strenuous supporter of the interests of the slaveholding states in all that related to their right to hold and increase their slave population. He contended earnestly against a grant of authority to the general government to prohibit the importation of slaves; for he supposed that his constituents would not surrender that right. But he finally entered into the arrangement by which the postponement of the power to prohibit the slave-trade to the year 1808 was made a ground of consent on the part of the Southern States to give the regulation of commerce to the Union. He considered it, he said, the true interest of the Southern States to have no regulation of commerce; but he yielded it, in consideration of the losses brought upon the commerce of the Eastern States by the Revolution, and of their liberality towards the interests of the Southern portion of the Confederacy.

The framers of the Constitution of the United States have

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<sup>1</sup> Madison, Elliot, V. 188.

often been reproached for permitting the slave-trade to be carried on for twenty years after the period of its formation; and the Eastern States have been especially accused of a sordid spirit of trade in purchasing for themselves the advantage of a national regulation of commerce by this concession. It is the duty of history, however, to record the facts in their true relations.

At the time when the Convention for framing our Constitution was assembled no nation had prohibited the African slave-trade. The English Quakers, following the example of their American brethren, had begun to move upon the subject, but it was not brought formally before Parliament until 1788; the trade was not abolished by act of Parliament until 1807, nor made a felony until 1810. Napoleon's decree of 1815 was the first French enactment against the traffic.

But in 1787 many of the members of the American Convention insisted that the power to put an end to this trade ought to be vested in the new government which they were endeavoring to form. But they found certain of the Southern States unwilling to deprive themselves of the supply of this species of labor for their new and yet unoccupied lands. Those states would not consent to a power of immediate prohibition, and they were extremely reluctant to yield even a power that might be used at a future period. They preferred to keep the whole subject in their own hands, and to determine for themselves when the importation should cease. The members of the Convention, therefore, who desired the abolition of this trade, found that, if they attempted to force these states to a concession that it ought to be immediately prohibited, either the regulation of commerce—the chief object for which the Convention had been called—could not be obtained for the new Constitution, or, if it were obtained, several of the Southern States would be excluded from the Union. The question, then, that presented itself to them was a great question of humanity and public policy, to be judged and decided upon all the circumstances that surrounded it.

Were they to form a union that should include only those states willing to consent to an immediate prohibition of the slave-trade, and thus leave the rest of the states out of that union, and independent of its power to restrain the importation of slaves? Were they to abandon the hope of forming a new Constitution

for the thirteen states that had gone together through all the conflicts and trials and sacrifices of the Revolution, or were they to form such a government, and secure to it the power at some early period of putting an end to this traffic? If they were to do the latter—if the cause of humanity demanded action upon this and all the other great objects dependent upon their decisions—how could the commercial interests of the country be better used than in the acquisition of a power to free its commerce from the stain and reproach of this inhuman traffic? By the arrangement which was to form one of the principal “compromises” of the Constitution, American commerce might achieve for itself the opportunity to do what no nation had yet done. By this arrangement it might be implied in the fundamental law of the new government about to be created for the American people that the abolition of the slave-trade was an object that ought to engage the attention of Christian states. Without it the abolition of this trade could not be secured within any time or by any means capable of being foreseen or even conjectured.

That the framers of the Constitution judged wisely, that they acted upon motives which will enable history to shield them from all reproach, and that they brought about a result alike honorable to themselves and to their country, will not be denied by those who remember and duly appreciate the fact that the Congress of the United States, under the Constitution, was the first legislative body in the world to prohibit the carrying of slaves to the territories of foreign countries.<sup>1</sup>

It is no inconsiderable honor to the statesmen situated as General Pinckney and other representatives of the Southern States were, that they should have frankly yielded the prejudices, and what they supposed to be the interests, of their constituents, to the great object of forming a more perfect union. Certainly they could urge, with equal if not greater force and truth, the same arguments for the continuance of the slave-trade which for nearly twenty years afterwards were continually heard in the British Parliament, and which postponed its abolition until long after the

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<sup>1</sup> Denmark, it is said, abolished the foreign slave-trade and the importation into her colonies in 1792, but the prohibitions were not to take effect until 1804. 1 Kent's Commentaries, 198, note (citing Mr. Wheaton).

people of England had become satisfied both of its inhumanity and its impolicy. Whether General Pinckney was right or wrong in the opinion that his constituents needed no national regulation of commerce, there can be no doubt of his sincerity when he expressed it. Nor can there be any doubt that he was fully convinced of the fact, when he asserted that they would not adopt a constitution that should vest in the national government an immediate power to prohibit the importation of slaves. He made, therefore, a real concession when he consented to the prohibition at the end of twenty years, and he made it in order that the union of the thirteen states might be preserved under a Constitution adequate to its wants.

For this, as well as for other services, he is entitled to a place of honor among the great men who framed the charter of our national liberties; and when we recollect that by his action he armed the national government with a power to free the American name from the disgrace of tolerating the slave-trade, before it was effectually put down by any other people in Christendom, we need not hesitate to rank him high among those who made great sacrifices for the general welfare of the country and the general good of mankind.<sup>1</sup>

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<sup>1</sup> In the first draft of the Constitution reported by the Committee of Detail, it was provided that the importation of such persons as the states might think proper to admit should not be prohibited. When the committee to arrange, if possible, certain compromises between the Northern and Southern States was raised, this provision, with other matters, was referred, and it was finally agreed that the importation should not be prohibited before the year 1808. After the adoption of the Constitution, Congress, by the acts of March 22d, 1794, and May 10th, 1800, prohibited the citizens and residents of the United States from carrying slaves to any foreign territory for the purpose of traffic. By the act of March 2d, 1807, the importation of slaves into the United States after January 1, 1808, was prohibited under severe penalties. In 1818 and 1819 these penalties were further increased, and in 1820 the offence was made piracy. Although the discussion of the subject commenced in England at about the same time (1788), it was nearly twenty years before a bill could be carried through Parliament for the abolition of the traffic. Through the whole of that period, and down to the very last, counsel were repeatedly heard at the bar, in behalf of interested parties, to oppose the reform. The trade was finally abolished by act of Parliament in March, 1807; it was made a felony in 1810, and declared to be piracy in 1824. While, therefore, the representatives of a few of the Southern States of this Union refused to consent to an immediate prohibition, they did

James Wilson, a signer of the Declaration of Independence, and one of the early judges of the Supreme Court of the United States, was one of the first jurists in America during the latter part of the last century.

He was born in Scotland about the year 1742. After studying at Glasgow, St. Andrews, and Edinburgh, he emigrated to Pennsylvania in 1766. He became, soon after his arrival, a tutor in the Philadelphia College, in which place he acquired great distinction as a classical scholar. He subsequently studied the law, and was admitted to the bar; and, after practising at different places, took up his residence at Philadelphia, where he continued to reside during the rest of his life.<sup>1</sup>

For six years out of the twelve that elapsed from 1775 to the summoning of the Convention of 1787, he was a member of Congress. Concerned in all the great measures of independence, the establishment of the Confederation, the peace, and the revenue system of 1783, he had acquired a fund of political experience which became of great value to the country and to himself. Although a foreigner by birth, he was thoroughly American in all his sentiments and feelings, and, at the time he entered the Convention, there were few public men in the country who perceived more clearly the causes of the inherent weakness of the existing government. During the war he had always considered the states, with respect to that war, as forming one community;<sup>2</sup> and he did not admit the idea that, when the colonies became independent of Great Britain, they became independent of each other.<sup>3</sup> From the Declaration of Independence he deduced the doctrine that the states by which that measure was adopted were independent in their confederated character, and not as individual

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consent to engraft upon the Constitution what was in effect a declaration that the trade should be prohibited at a fixed period of time; and the trade was thus abolished by the United States, under a government of limited powers, with respect to their own territories, as soon as it was abolished by the "omnipotent" Parliament of Great Britain. Moreover, by consenting to give to the Union the power to regulate commerce, the Southern States enabled Congress to abolish the slave-trade with foreign countries thirteen years before the same trade was made unlawful to British vessels.

<sup>1</sup> *Encyclopædia Americana*, Art. "Wilson, James."

<sup>2</sup> Madison, Elliot, V. 78.

<sup>3</sup> *Ibid.*, 218.

communities. This rather subtle distinction may seem now to have been of no great practical moment, since the Confederation had actually united the states as such, rather than the inhabitants of the states. But it was one of the positions assumed by those who desired to combat the idea that the states, when assembled in Convention, were restrained, by their position as equal and independent sovereignties, from adopting a plan of government founded on a representation of the people. To this objection Mr. Wilson repeatedly addressed himself, and his efforts had great influence in causing the adoption of the principle by which the people of the states became directly represented in the government in the ratio of their numbers. He showed that this principle had been improperly violated in the Confederation, in consequence of the urgent necessity of forming a union, and the impossibility at that time of forming any other than a union of the states. As a new partition of the states was now impracticable, it became necessary for them to surrender a portion of their sovereignties, and to permit their inhabitants to enter into direct relations with a new federal union. He pointed out the twofold relation in which the people must henceforth stand—in the one, they would be citizens of the general government; in the other, they would be citizens of their particular state. As both governments were derived from the people, and both were designed for them, both ought to be regulated on the same principles. In no other way could the larger states consent to a new union; and if the smaller states could not admit the justice of a proportionate representation, it was in vain to expect to form a constitution that would embrace and satisfy the whole country.

This great idea of a representative government was in fact the aim of all Mr. Wilson's exertions; and when the Constitution was formed, he enforced this idea in the Convention of Pennsylvania with singular power. His speech in that body is one of the most comprehensive and luminous commentaries on the Constitution that have come down to us from that period. It drew from Washington a high encomium, and it gained the vote of Pennsylvania for the new government, against the ingenious and captivating objections of its opponents.

The life of this wise, able, and excellent man was comparatively short. In 1789 he was appointed by Washington a judge of

the Supreme Court of the United States. While on a circuit in North Carolina, in the year 1798, he died at Edenton, at about the age of fifty-six. The character of his mind and the sources of his influence will be best appreciated by examining some of the more striking passages of his principal speech on the Constitution, made in the Convention of Pennsylvania.<sup>1</sup>

Edmund Randolph, a "child of the Revolution,"<sup>2</sup> was governor of Virginia at the time of the Federal Convention. Probably it was on account of his position as the chief magistrate of the state that he was, by the general consent of his colleagues, selected to bring forward the Virginia plan of government, which was submitted at an early period of the deliberations, and which became, after great modifications, the nucleus of the Constitution.

At an early age, in August, 1775, Randolph joined the army at Cambridge, and was immediately taken into Washington's military family as an aide-de-camp.<sup>3</sup> He served in this capacity, however, no longer than until the following November, when he was suddenly recalled to Virginia by the death of his relative, Peyton Randolph, the president of the First Continental Congress.

In 1779 he became a member of Congress from Virginia, and served until March, 1782.

In 1786 he was elected governor of Virginia, succeeding in that office Patrick Henry. In this capacity it became his duty to secure the attendance of Washington upon the Federal Convention. This matter he managed with great tact and delicacy; and, by the aid of other friends, he succeeded in overcoming the scruples of the illustrious patriot then reposing in the retirement of Mount Vernon.

Governor Randolph's conduct with regard to the Constitution might seem to be marked by inconsistency, if we were not able to explain it by the motive of disinterested patriotism from which he evidently acted. He brought to the Convention the most serious apprehensions for the fate of the Union. But he thought

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<sup>1</sup> Elliot's Debates, II. 423, 424, 524-529.

<sup>2</sup> His own description of himself in a speech made in the Virginia Convention which ratified the Constitution. Elliot, III. 65.

<sup>3</sup> Washington's Writings, IX. 66.

that the dangers with which it was surrounded might be averted, by correcting and enlarging the Articles of Confederation. When, at length, the government which was actually framed was found to be a system containing far greater restraints upon the powers of the states than he believed to be either expedient or safe, he endeavored to procure a vote authorizing amendments to be submitted by the state conventions and to be finally decided on by another general convention. This proposition having been rejected, he declined to sign the Constitution, desiring to be free to oppose or advocate its adoption, when it should come before his own state, as his judgment might dictate.

When the time for such action came he saw that the rejection of the Constitution must be followed by disunion. He had wearied himself in endeavoring to find a possibility of preserving the Union without an unconditional ratification by Virginia. To the people of Virginia, therefore, he painted with great force and eloquence the consequences of their becoming severed from the rest of the country. Virginia was not, he said, invulnerable. She was accessible to a foreign enemy by sea, and through the waters of the Chesapeake. Her situation by land was not less exposed. Her frontiers adjoined the states of Pennsylvania, Maryland, and North Carolina. With the first she had long had a disputed boundary, concerning which there had been imminent danger of a war, that had been averted with the greatest difficulty. With Maryland there was an ancient controversy upon the navigation of the Potomac, and that controversy, if decided on grounds of strict right, would be determined by the charter of Maryland in favor of that state. With North Carolina, too, the boundary was still unsettled. Let them call to mind, then, the history of every part of the world where independent nations bordered in the same way on one another. Such countries had ever been a perpetual scene of bloodshed; the inhabitants of one escaping from punishment into the other—protection given to them—consequent pursuit, violence, robbery, and murder. A numerous standing army, that dangerous expedient, could alone defend such borders.

On her western frontier Virginia was peculiarly exposed to the savages, the natural enemies of the white race, whom foreign gold could always incite to commit the most horrible ravages upon her people. Her slave population, bearing a very large propor-



tion to the whites,<sup>1</sup> necessarily weakened her capacity to defend herself against such an enemy.

Virginia, then, must be defended. Could they rely on the militia? Their militia did not, at the utmost, exceed sixty thousand men. They had performed exploits of great gallantry during the late war, but no militia could be relied on as the sole protectors of any country. Besides, a part of them would be wanted for the purposes of agriculture, for manufactures, and for the mechanic arts necessary for the aid of the farmer and the planter. They must have an army; and they must also have a navy. But how were these to be maintained without money? The enormous debt of Virginia, including her proportion of the continental debts, was already beyond her ability to pay from any revenue that could be derived from her present commerce.

In this state of things, looking forward to the consequences of a dissolution of the Union, he could not but remind the people of Virginia of what took place in 1781, when the power of a dictator was given to the commander-in-chief, to save the country from destruction. At some period, not very remote, might not their future distress impel them to do what the Dutch had done—throw all power into the hands of a stadtholder? How infinitely more wise and eligible than this desperate alternative would be a union with their American brethren. “I have labored,” said he, “for the continuance of the Union—the rock of our salvation. I believe, as surely as that there is a God, that our safety, our political happiness and existence, depend on the union of the states; and that, without this union, the people of this and the other states will undergo the unspeakable calamities which discord, faction, turbulence, war, and bloodshed have produced in other countries. The American spirit ought to be mixed with American pride, to see the Union magnificently triumphant. Let that glorious pride which once defied the British thunder reanimate you again. Let it not be recorded of Americans that, after having performed the most gallant exploits, after having overcome the most astonishing difficulties, and after having gained the admiration of the world by their incomparable valor and policy, they lost their ac-

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<sup>1</sup> He stated the number of blacks to be 236,000, and that of the whites only 352,000.

quired reputation, their national consequence and happiness, by their own indiscretion. Let no future historian inform posterity that they wanted wisdom and virtue to concur in any regular, efficient government. Should any writer, doomed to so disagreeable a task, feel the indignation of an honest historian, he would reprehend our folly with equal severity and justice. Catch the present moment—seize it with avidity—for it may be lost, never to be regained! If the Union be now lost, I fear it will remain so forever. I believe gentlemen are sincere in their opposition, and actuated by pure motives; but when I maturely weigh the advantages of the Union, and the dreadful consequences of its dissolution; when I see safety on my right, and destruction on my left; when I behold respectability and happiness acquired by one course, but annihilated by the other—I cannot hesitate in my decision.”<sup>1</sup>

The nine persons of whom some account has now been given were the most important members of the Convention, and those who exercised the largest influence upon its decisions. But the entire list embraced other men of great distinction and ability, celebrated, before and since the Convention, in that period of the political history of America which commenced with the Revolution and closed with the eighteenth century. Such were Roger Sherman of Connecticut, Robert Morris of Pennsylvania, John Dickinson of Delaware, John Rutledge and Charles Pinckney of South Carolina, and George Mason of Virginia. Of the rest, all were men of note and influence in their respective states, possessing the full confidence of the people whom they represented.

The whole assembly consisted of only fifty-five members, representing twelve states.<sup>2</sup> That so small a body should have contained so large a number of statesmen of pre-eminent ability is a striking proof of the nature of the crisis which called it into existence. The age which had witnessed the Revolution, and the wants and failures that succeeded it, produced and trained these men, made them capable of the highest magnanimity, and gave them the intellectual power necessary to surmount the diffi-

<sup>1</sup> Debates in the Virginia Convention, Elliot, III. 65–86.

<sup>2</sup> For a full list of the delegates, see the Appendix to this volume.

culties that obstructed the progress of their country to prosperity and renown. These, with a few of their contemporaries at that moment engaged in other spheres of public duty, are the men who illustrate and adorn it, and the knowledge of their lives and actions is of unspeakable importance to the people of the United States.

NOTE.—For the following account of the genealogy of Governor Randolph, I am indebted to one of his female descendants.

Edmund Randolph was the son of John Randolph and grandson of Sir John Randolph, each of whom was attorney-general of the colony under the royal government. He was educated at William and Mary's College. Peyton Randolph, President of the First Continental Congress, was also a son of Sir John Randolph, and uncle of Edmund Randolph, to whom he devised his estate. Sir John Randolph was one of five or six sons of William Randolph of Turkey Island in Virginia, from whom all the Randolphs in Virginia are descended. Of this William Randolph little is known, beyond the fact that he was a large landholder, and a nephew of Thomas Randolph, the poet, who flourished in the reigns of James I. and Charles I., 1605–1634.

## CHAPTER XVII.

PRELIMINARY CONSIDERATIONS.—ORGANIZATION OF THE CONVENTION.

—POSITION OF THE STATES.—RULE OF INVESTIGATION.

HAVING sketched the struggles, the errors, and the disappointments of the earlier years of our constitutional history, I now come to consider the proceedings of that memorable assembly to which they ultimately led, in order to describe the character of an era that offered the alternatives of a more vigorous nationality and final dissolution. How the people of the United States were enabled to seize the happy choice of one of these results, and to escape the disasters of the other, is to be learned by examining the mode in which the Constitution of the United States was framed.

In approaching this interesting topic, I am naturally anxious to place myself at once on a right understanding with the reader—to apprise him of the purpose of the discussions to which he is invited, and to guard against expectations which might be entertained, but which will not be fulfilled.

In a work designed for general and—as I venture to hope it may prove—for popular use, it would be out of place, as it certainly would be impracticable within the limits of a single volume, to undertake the explanation and discussion of all those particular questions of construction that must constantly arise under almost every clause and feature of such an instrument as the Constitution of the United States, and which, as our whole experience has taught us, are fruitful both of extensive debate and of wide as well as honest diversities of opinion. I shall consider questions of construction only so far as may be necessary to elucidate my subject; for I propose, in writing the history of the formation of the Constitution, to describe rather those great modifications in the principles and structure of the Union that took place in the period at which we have now arrived in the course of this work; to state

the essential features of the new government; and to trace the process by which they were evolved from the elements to which the framers of that government resorted.

Happily for us, the materials for such a description are ample. The whole civil change which transformed the character of our Union, and established for it a national government, took place peacefully and quietly, within a single twelvemonth. It was attended with circumstances which enable us to ascertain its character with a high degree of certainty. The leading purposes that were entertained and carried out were not left to the conjecture of posterity, but were recorded by deliberative assemblies, whose acts of themselves expressed and ascertained the objects and intentions of the national will. First framed by an assembly in which the states participating in the change were fully represented, and subsequently debated and ratified in conventions of the people in the separate states, the general nature and design of the Constitution may be traced and understood without serious difficulty.

But to the right understanding of its nature and objects a careful examination of the proceedings of the national Convention is, in the first place, essential. Before we enter, however, upon this examination, there are certain preliminary facts that explain the circumstances in which the Convention was assembled, and which will enable us to appreciate the results at which it arrived. To these, therefore, the reader is now desired to turn.

First of all, then, it is to be remembered that the national Convention of 1787 was assembled with the great object of framing a system of government for the united interests of the thirteen states, by which the forms and spirit of republican liberty could be preserved. The warnings and teachings of the ten preceding years, which I have described in a previous part of this volume, had presented to the people of these states the serious question whether their system of conducting their common affairs then rested upon principles that could secure their permanent prosperity and happiness. That the states had national interests; that each of them stood in relations to the others, and to the rest of the world, which its separate and unaided power was unable to manage with success; and that even its own internal peace and security required some external protection, had been brought home to the convic-

tions of the people by an experience that commenced with the day on which they declared themselves independent, and had now forced upon them its last stern and sorrowful lesson in the general despondency. As they turned anxiously and fearfully to the near and dear interests involved in their separate and internal concerns, they saw that self-government was a necessity of their existence. They saw that equality before the law for the whole people; the right and the power to appoint their own rulers; the right and the power to mould and form and modify every law and institution at their own sovereign will, to lay restraints upon their own power, or not to lay them, to limit themselves by public compact to a particular mode of action, or to remain free to choose other modes, were the essential conditions of American society. In a word, they beheld that republican and constitutional liberty, which, with all that it comprehends and all that it bestows, was not only altogether lovely in their eyes, but without which there could be no peace, no social order, no tranquillity, and no safety for them and their posterity.

This liberty they knew must be preserved. They loved it with passionate devotion. They had been trained for it by the whole course of their political and social history. They had fought for it through a long and exhausting war. Their habits of thought and action, their cherished principles, their hopes, their life as a people, were all bound up in it; and they knew that, if they suffered it to be lost, there would remain for them nothing but a heritage of shame, and ages of confusion, strife, and sorrow.

Great as was their devotion to this republican liberty, and ardent as was their love of it, they did not value it too highly. The doctrine that all power resides originally in the people; that they are the source of all law; that their will is to be pronounced by a majority of their numbers, and can know no interruption, was not first discovered in America. But to this principle of a democracy the people of the American states had added two real and important discoveries of their own. They had ascertained that their own power might be limited by compacts which would regulate and define the modes in which it shall be exercised. Their written constitutions had taken the place of the royal charters which formerly embraced the fundamental conditions of their political existence, but with this essential difference—that

whereas the charter emanated from a foreign sovereign to those who claimed no original authority for themselves, the Constitution proceeded from the people, who claimed all authority to be resident in themselves alone. While the charter embraced a compact between the foreign sovereign and his subjects who lived under it, the Constitution, framed by the people for their own guidance in exercising their sovereign power, became a compact between themselves and every one of their number. In this substitution of one supreme authority for another, some limitation of the mode in which the sovereign power was to act became the necessary consequence of the change; for as soon as the people had declared and established their own sovereignty, some declaration of the nature of that sovereignty, and some prescribed rules for its exercise, became immediately necessary, and that declaration and those rules became at once a limitation of power, extending to every citizen the protection of every principle involved in them, until the same authority which had established should change them.

Against the evils, too, that might arise from the unrestricted control of a majority of the people over the fundamental law—against the abuse of their power by frequent and passionate changes of the rules which limit its exercise for the time being—they had discovered the possibility of limiting the mode in which the organic law itself was to be changed. By prescribing certain forms in which the change was to be made, and especially by requiring the fact that a change had been decreed by those having a right to make it to be clearly and carefully ascertained by a particular evidence, they guarded the fundamental law itself against usurpation and fraud, and greatly diminished the influences of haste, prejudice, and passion.

Such was the nature of American republican liberty; not then fully understood, not then fully developed in all the states, but yet discovered—a liberty more difficult of attainment, more elaborate in its structure, and therefore more needful of defence, than any of the other forms of constitutional freedom under which civilized man had hitherto been found.

Now, the fate of republican liberty in America, at that day, depended directly upon the preservation of some union of the states, and not simply upon the existing state institutions, or upon

the desires of the people of each separate state. It is true that their previous training and history, and their own intelligent choice, had made the states, in all their forms and principles, republican governments; and almost all of them had, at this period, written constitutions, in which the American ideal of such governments was aimed at, and more or less nearly reached. But how long were these constitutions, these republican forms, to exist? What was to secure them? Who was to stand as their guarantor and protector, and to vindicate the right of the majority to govern and alter and modify? Who was to enforce the rules which the people of a state had prescribed for their own action, when threatened by an insurgent and powerful minority? Who was to protect them against foreign invasion or domestic violence? There was no common sovereign, or supreme arbiter, to whom they could all alike appeal. There was no power upon this broad continent to whom the states could intrust the duty of preserving their institutions inviolate, except the people of the United States in some united and sovereign capacity. No single state, however great its territory or its population, could have discharged these duties for itself by its unaided power; for no one of them could have repelled a foreign invasion alone, and the government of one of the most respectable and oldest of them, whose people had exhibited as much energy as any other community in America, had almost succumbed to the first internal disorder which it had been forced to encounter.

The preservation of the union of the states was, therefore, essential to the continuance of their independence, and to the continuance of republican constitutional liberty—of that liberty which resides in law duly ascertained to be the authentic will of a majority. With this vastly important object before them, the people of the states could give to the Union no form that would not reflect the same spirit, and harmonize with the nature of their existing institutions. To have left their state governments resting upon the broad basis of popular freedom acting through republican forms, and to have framed, or to have attempted to frame, national institutions on any other model, would have been an act of political suicide. To enable the Union to preserve and uphold the authority of the people within the respective states, it must itself be founded on the same authority, must embody the



same principles, spring from the same source, and act through similar institutions.

Accordingly, the student of this portion of our history will find everywhere the clearest evidence that, so far as the purpose of forming a national government of a new character was entertained at the period when the Convention was assembled, a republican form for that government was a foregone conclusion. Not only did no state entertain any purpose but this, but no member of the Convention entered that body with any expectation of a different result. There is but one of the statesmen composing that assembly to whom a purpose of creating what has been called a monarchical government has ever been distinctly imputed; and with regard to him, as much as to every other person in the Convention, I shall show that the imputation is unjust. Hamilton—for it is to him, of course, that I now allude—together with many others, believed that a failure, at that crisis, to establish a government of sufficient energy to pervade the whole Union with the necessary control, would bring on at once a state of things that must end in military despotism. Hence his efforts to give to the republican form, which he acknowledged to be the only one suited to the circumstances and condition of the country, the highest degree of vigor, stability, and power that could be attained.

Another very important fact, which the reader is to carry along with him into the examination of the proceedings of the Convention, is, that by the judgment of the old Congress, and of every state in the Union save one,<sup>1</sup> the Confederation had been declared defective and inadequate to the exigencies of government and the preservation of the Union. That this declaration was expressly intended to embrace the principle of the Union, or looked to the substitution of a system of representative government, to which the people of the states should be the immediate parties, in the place of their state governments, does not appear from the proceedings which authorized and constituted the Convention. In substance, those proceedings ascertained that there were great defects in the existing Confederation; that there were important purposes of the federal Union which it had failed to secure; and that a convention of all the states, for the purpose

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<sup>1</sup> Rhode Island.

of revising and amending the Articles of Confederation, was the most probable means of establishing a firm general government, and was therefore to be held. But what were the original purposes of the Union, or what purposes had come to be regarded as essential to the public welfare, was not indicated in most of the acts constituting the Convention. Virginia, whose declaration preceded that of Congress and of the other states, and on whose recommendation they all acted, had made the commercial interests of the United States the leading object of the proposed assembly; but she had also declared the necessity of extending the revision of the federal system to all its defects, and had advised further concessions and provisions, in order to secure the great objects for which that system was originally instituted. These general and somewhat indefinite purposes were declared by the other states, without any material variation from the terms employed by Virginia.<sup>1</sup>

Hence it is that the previous history of the Union becomes important to be examined before we can appreciate the great general purposes of its original formation, as they were understood at the time of these proceedings, or can appreciate the further purposes that were intended to be engrafted upon it. The declarations made by the Congress and the states seem obviously to embrace two classes of objects; the one is what, in the language of Virginia, they conceived to have been "the great objects for which the federal government was instituted;" the other is the "exigencies of the Union," for peace as well as for war, as they had been displayed and developed by the defects of the Confederation, and by its failures to secure the general welfare. The first of these classes of objects could be ascertained by reference to the terms and provisions of the Articles of Confederation; the second could only be ascertained by resorting to the history of the confederacy, and by regarding its recorded failures to promote the general prosperity as proofs of what the exigencies of the Union demanded in a general government.<sup>2</sup>

<sup>1</sup> New Jersey specifically contemplated a regulation of commerce. See the proceedings of Congress, and those of the states, ante, pp. 244, 248, notes.

<sup>2</sup> Thus, for example, the regulation of commerce was not one of the original purposes for which the Union was formed in 1775 or in 1781. But it became one of the exigencies of the Union, by becoming a national want, and by the revealed

In the early part of this volume we have examined the nature and operation of the previous Union, in both of its aspects, and we must carry the results of that examination along with us in studying the formation of the new system. We have seen the character of the Union which was formed by the assembling of the Revolutionary Congress, to enable the states to secure their independence of the crown of Great Britain. We have seen that, from the jealousies of the states, even this Congress never assumed the whole revolutionary authority which its situation and office would have entitled it to exercise. We have seen also, that, from the want of a properly defined system, and from the absence of all proper machinery of government, it was unable to keep an adequate army in the field, until, in a moment of extreme emergency, it conferred upon the commander-in-chief the powers of a dictator. We have witnessed the establishment of the Confederation—a government which bore within itself the seeds of its own destruction; for it relied entirely, for all the sinews of war, upon requisitions on the states, with which the states perpetually refused or neglected to comply. We have thus seen the war lingering and languishing until foreign aid could be procured, and until loans of foreign money supplied the means of keeping it alive long enough for the admirable courage, perseverance, and energy of Washington to bring it to a close, against all obstacles and all defects of the civil power. When the war was at length ended, and the duty of paying the debts thus incurred to the meritorious and generous foreign creditor, and the more than meritorious and generous domestic creditor, pressed upon the conscience of the country, we have seen that there was no power in the Union to command the means of paying even the interest on its obligations. We have seen that the treaty of peace could not be executed; that the Confederation could do nothing to secure the republican governments of the states; that the commerce of the country could not be protected against the policy of foreign governments, constantly watching for advantages which the clashing interests of the different states at all times held out to them; and that,

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incompetency of most of the states to deal with the subject so as to promote their own welfare, or to avoid injury to their confederates. So of a great many other things, for which we must resort, as the framers of the Constitution resorted, to the history of the times.

with the rule which required the assent of nine states to every important measure, it was possible for the Congress to refuse or neglect to do what it was of the last importance to the people of the United States they should do. Finally, we have seen that what now kept the existing Union from dissolution, as it had been one immediate inducement to its formation, was the cession of the vast Northwestern Territory to the United States; and that over this territory new states were forming, to take their places in the band of American republics, while the Confederation possessed no sufficient power to legislate for their condition, or to secure their progress towards the great ends of civil liberty and prosperity.

A retrospection, therefore, of the previous history of the Confederacy, while it reveals to us the public appreciation of the national wants and the national failures, displays the general purposes contemplated by the states when they undertook effectually to provide for "the exigencies of the Union." But what the nature of the proposed changes was to be, and in what mode they were to be reached, was, as we have seen, left undetermined by the constituent states when they assembled the Convention; and we are now, therefore, brought to the third preliminary fact, necessary to be regarded in our future inquiries, namely, the condition of the actual powers of that assembly.

The Confederation has already been described as a league, or federal alliance between independent and sovereign states, for certain purposes of mutual aid. So far as it could properly be called a government, it was a government for the states in their corporate capacities, with no power to reach individuals; so that, if its requirements were disregarded, compulsion could only be directed—if against anybody—against the delinquent member of the association, the state itself.

At the time when the Convention was assembled, the general purpose entertained throughout the Union appears to have been, by a revision and amendment of the Articles of Confederation, to give to the Congress power over certain subjects, of which that instrument did not admit of its taking cognizance, and to add such provisions as would render its power efficient. But it was not at all understood by the country at large that, while the nominal powers of the Confederation might be increased at the pleasure of the states, those powers could not be made effectual with-

out a change in the principle of the government. Hence, the idea of abolishing the Confederation, and of erecting in its place a government of a totally different character, was not entertained by the states, or, if entertained at all, was not expressed in the public acts of the states by which the Convention was called. This idea, however, was perhaps not necessarily excluded by the terms employed by the states in the instruction of their delegates; and we may, therefore, expect to find the members of that assembly, in construing or defining the powers conferred upon it, taking a broader or narrower view of those powers, according to the character of their own minds, the nature of their previous public experience, and the real or supposed interests of their particular states.

Many of the persons who had been clothed with this somewhat vague and indeterminate authority to "revise" the existing federal system, and to agree upon and propose such amendments and further provisions as might effectually provide for the "exigencies of the Union," were statesmen who had passed the active period of their previous lives in vain endeavors to secure efficient action for the powers possessed by the Congress, both under the revolutionary government and under the Confederation. They were selected by their states on account of this very experience, and in order that their counsels might be made available to the country.<sup>1</sup> They saw that the mere grant of further powers, or the mere consent that the Congress should have jurisdiction over certain new subjects, would be of no avail while the government continued to rest upon the vicious principle of a naked federal league, leaving the question constantly to recur, whether the compact was not virtually dissolved by the refusal of individual states to discharge their federal obligations. These persons, consequently, came to the Convention feeling strongly the necessity for a radical change in the principles and structure of the national Union; but feeling also great embarrassment as to the mode in which that change was to be effected.

On the other hand, there were other members of the Convention who came with a disposition to adhere to the more literal meaning of their instructions, and who did not concur in the alleged necessity for a radical change of the principle of the gov-

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<sup>1</sup> See the preamble to the act of Virginia, ante, p. 248, note.

ernment. Fearing that the power and consequence of their own states would be diminished by the introduction of numbers as a basis of representation, they adhered to the system of representation by states, and insisted that nothing was needed to cure the evils that pressed upon the country but to enlarge the jurisdiction of the Congress under that system. They were naturally, therefore, the first to suggest and the last to surrender the objection, that the Convention had received no authority, either from the states or from the Congress, to do anything more than revise the Articles of Confederation, and recommend such further powers as might be engrafted upon the present system of the Union.

That the construction of their powers by the latter class of the members of the Convention comported with the mere terms of the acts of the states, and with the general expectation, I have more than once intimated; but we shall see, as the experiment of framing the new system proceeded, that the views of the other class were equally correct; that the addition of further powers to the existing system of the Union would have left it as weak and inefficient as it had been before; and that what were universally regarded as the "exigencies of the Union"—which was but another name for the wants of the states—could only be provided for by the creation of a different basis for the government.

Another fact which we are to remember is the presence, in five of the states represented in the Convention, of large numbers of a distinct race, held in the condition of slaves. Whatever mode of constituting a national system might be adopted, if it was to be a representative government, the existence of these persons must be recognized and provided for in some way. Whatever ratio of representation might be established—whether the states were to be represented according to the numbers of their inhabitants, or according to their wealth—this part of the population of the slaveholding states presented one of the great difficulties to be encountered. A change of their condition was not now, and never had been, one of the powers which those states proposed to confide to the Union. In no previous form of the Confederacy had any state proposed to surrender its own control over the condition of persons within its limits, or its power to determine what persons should share in the political rights of that community; and no state that now took part in the new effort to amend the

present system of the Union proposed to surrender this control over its own inhabitants, or sought to acquire any control over the condition of persons within any of the other states.

The deliberations of the Convention were therefore begun with the necessary concession of the fact that slavery existed in some of the states, and that the existence and continuance of that condition of large masses of its population was a matter exclusively belonging to the authority of each state in which they were found. Not only was this concession implied in the terms upon which the states had met for the revision of the national system, but the further concession of the right to have the slave populations included in the ratio of representation became equally unavoidable. They must be regarded either as persons or as chattels. If they were persons, and the basis of the new government was to be a representation of the inhabitants of the states according to their numbers—the only mode of representation consistent with republican government—their precise condition, their possession or want of political rights, could not affect the propriety of including them in some form in the census, unless the basis of the government should be composed exclusively of those inhabitants of the states who were acknowledged by the laws of the states as free. The large numbers of the slaves in some of the states would have made a government so constructed entirely unequal in its operation, and would have placed those states, if they had been willing to enter it—as they never could have been—in a position of inferiority which their wealth and importance would have rendered unjustifiable. On the other hand, if the wealth of the states was to be the measure of their representation in the new government, the slaves must be included in that wealth, or they must be treated simply as persons. The slaves might or might not be persons, in the view of the law, where they were found; but they were certainly in one sense property under that law, and as such they were a very important part of the wealth of the state. The Confederation had already been obliged to regard them, in considering a rule by which the states should contribute to the national expenses. They had found it to be just that a state should be required to include its slaves among its population, in a certain ratio, when it was called upon to sustain the national burdens in proportion to its numbers; and they had recommended the adop-

tion of this fundamental rule as an amendment of the federal Articles.<sup>1</sup> Either in one capacity, therefore, or in the other, or in both—either as persons or as property, or as both—the Union had already found it to be necessary to consider the slaves. In framing the new Union it was equally necessary, as soon as the equality of representation by states should give place to a proportional and unequal representation, to regard these inhabitants in one or the other capacity, or in both capacities, or to leave the states in which they were found, and in which their position was a matter of grave importance, out of the Union.

This difficulty should be rightly appreciated and fairly stated by the historian who attempts to describe its adjustment, and it should be carefully regarded by the reader. What reflections may arise upon the facts that we have to consider—what should be the judgment of an enlightened benevolence upon the whole matter of slavery, as it was dealt with or affected by the Constitution of the United States—may find an appropriate place in some future discussion.

Here, however, the reader must approach the threshold of the subject with the expectation of finding it surrounded by many and complex relations. History should undoubtedly concern itself with the interests of man. But it is bound, as it makes up the record of events which involve the destinies and welfare of different races, to look at the aggregate of human happiness. It is not to rest, for its final conclusions, in seeming or in real inconsistencies; in real or apparent conflicts between opposite principles; or in the mere letter of those adjustments by which such conflicts have been avoided, or reconciled, or acknowledged. It is to arrive at results. It is to draw the wide deduction which will show whether human nature has lost or gained by the conditions and forms of national existence which it undertakes to describe. As the question should always be, in such inquiries, whether any different and better result was attainable under all the circumstances of the case—a question to which a calm and

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<sup>1</sup> See the resolve of Congress, passed April 18, 1783, proposing to amend the Articles of Confederation. This resolve was the origin of the proportion of three fifths, in counting the slaves. See post, Chapter XVIII. p. 343; ante, p. 144, note 2.



dispassionate examination will generally find an answer — the amount of positive good that has been gained for all, or of positive evil that has been averted from all, is the true justification of political institutions.

The Convention, when fully organized, embraced a representation from all the states, with the single exception of Rhode Island.

Connecticut, which had steadily opposed the measure of a Convention,<sup>1</sup> came into it at a late period, and did not send a delegation until a fortnight after the time appointed for its session.<sup>2</sup> It had always been the inclination of that state to retain in her own hands the regulation of commerce; she had taxed imports from some of her neighbors, and this advantage, as it was considered, had made her reluctant to enlarge the powers of the Union. Her delegation appeared on the 28th of May.

That of New Hampshire was not appointed until the latter part of June,<sup>3</sup> and did not appear until the 23d of July.<sup>4</sup>

Rhode Island, small in territory and in numbers, but favorably situated for the pursuits of commerce, had strenuously resisted every effort to enlarge the powers of the Union. Ever since the Declaration of Independence, the people of that state had clung to the opportunity, afforded by their situation, of taxing the contiguous states, through their consumption of commodities brought into its numerous and convenient ports. For this object they had refused their assent to the revenue system of 1783; and as the failure of that system had prevented an exhibition of some of the benefits to be derived from uniform fiscal regulations, the local government of Rhode Island adhered, in 1786-7, to what they had always regarded as the true interest of their state. They did, it is true, appoint delegates to the commercial convention at Annapolis, but the persons appointed did not attend; and when the resolve which sanctioned the Convention of 1787 was adopted in Congress, Rhode Island was not represented in that body.

When the recommendation of the Congress came before the legislature of the state, there appears to have been a strong party in favor of making an appointment of delegates to the Convention. The mercantile part of the population had come to enter-

<sup>1</sup> Madison, Elliot, V. 96.

<sup>2</sup> Ibid., 124.

<sup>3</sup> Elliot, I. 126.

<sup>4</sup> Ibid., 351.

tain more liberal and far-seeing notions of their true interests; and the views of some of the more intelligent of the farmers and mechanics had been much modified. But by far the larger portion of the people—wedded to a system of paper money, which furnished almost their sole currency, and vaguely apprehending that a new government for the Union would destroy it, seeking the abolition of debts, public and private, and jealous of all influence from without—were in a condition to be ruled by their demagogues, rather than to be enlightened and aided by their statesmen. In May the legislature rejected a proposition to appoint delegates to the Federal Convention; and in June, although the upper house, or governor and council, embraced the measure, it was again negatived in the House of Assembly by a large majority. The minority then formed an organization, which never lost sight of the national relations of the state, and which finally succeeded in bringing her into the Union under the new Constitution, in 1790.

Immediately after the first rejection of the proposal to unite with the other states in reforming the Confederation, a body of commercial persons in Providence addressed a letter to the Convention, expressing the opinion that full power for the regulation of the commerce of the United States, both foreign and domestic, ought to be vested in the national council, and that effectual arrangements should also be made for giving operation to the existing powers of Congress in their requisitions for national purposes. Their object in this communication was to prevent an impression among the other states, unfavorable to the commercial interests of Rhode Island, from growing out of the circumstance of their being unrepresented in the Convention. Expressing the hope that the result of its deliberations would be to “strengthen the Union, promote the commerce, increase the power, and establish the credit of the United States,” they pledged their influence and best exertions to secure the adoption of that result by the state of Rhode Island. The signers of this letter formed the nucleus of that party which afterwards fulfilled the pledge thus given to the Convention.

The absence of Rhode Island did not occasion a serious embarrassment. The resolve of Congress recommending the Convention did not expressly require the presence of all the states; and

the commissions given by each of the states which adopted the recommendation clearly implied that their delegates were to meet and act with the delegations of such other states as might see fit to be represented. The communication of the minority party in Rhode Island was received and read, and the interests of that state were attended to throughout the proceedings.

We are now carefully to observe the position of the states when thus assembled in Convention. Their meeting was purely voluntary; they met as equals; and they were sovereign political communities, whom no power could rightfully coerce into a change of their condition, and with whom such a change must be the result of their own free and intelligent choice, governed by no other than the force of circumstances. That they were independent of foreign control was ascertained by the Declaration of Independence, by the war, and by the Treaty of Peace. That they were independent of each other, except so far as they had made certain mutual stipulations in the Articles of Confederation, was the necessary result of the events which had made the people of each state its rightful and exclusive sovereigns. We must recur, therefore, to the Articles of Confederation for the purpose of determining the nature of the position in which the states now stood.

When the states, in 1781, entered into the Confederacy then established, they reserved their freedom, sovereignty, and independence, and every jurisdiction, power, and right not expressly delegated to the United States. By the provisions of the federal compact these separate and sovereign communities committed to a general council the management of certain interests common to them all; in that council they were represented equally, each state having one vote; but as neither the powers conferred upon that body, nor the restraints imposed by the states upon themselves, were to be enforced by any agreed sanctions, the parties to the compact were left to a voluntary performance of their stipulations. Still, there were certain powers which the states agreed should be exercised by the United States in Congress assembled, and certain duties towards the Confederacy which they agreed to discharge; and therefore, so far as authority and jurisdiction had been conferred upon the United States, so far they had been surrendered by the states. The peculiarity of the case was, that the

powers surrendered were ineffectual for the want of appropriate means of coercion.

These powers the states did ~~not propose to recall~~. The Union was unbroken, though feeble, and trembling on the verge of dissolution. The purpose of all was to strengthen and secure its powers, to add somewhat to their number, and to render the whole efficient and operative by providing some form of direct and compulsory authority. For this end, as members of an existing confederacy, in possession of all the powers not previously delegated to the Union, the states had assembled upon the same equality, and under the same form of representation, with which they had always acted in the Congress.

As the states had conferred certain powers upon the Confederation, so it was equally competent to them to enlarge and add to those powers. They had formed state governments, and established written constitutions. But the people of the states, and not their governments, held the supreme, absolute, and uncontrollable power. They had created, and they could modify or destroy; they could withdraw the powers conferred upon one class of agents, and bestow them upon another class. What was wanted was the discovery of some mode of proceeding which, by involving the consent of the state governments, would avoid the appearance and the reality of revolution, and make the contemplated changes consist with the American idea of constitutional action.

Here also it seems proper to state the reasons why the process of framing the Constitution is so important as to demand a careful exhibition of the proceedings of those to whom this great undertaking was intrusted.

The Convention had confessedly no power to enact or establish anything. It was a representative body, clothed with authority to agree upon a system of government to be recommended to the adoption of their constituents. The constituents were twelve of the thirteen states of the Confederacy, each having an equal voice and vote in the proceedings; but neither the assent nor the dissent of a state, in the Convention, to the whole system, or to any part of it, bound the people of that state to receive or to reject it when it should come before them. Still, the results of the various determinations of a majority of the states in this body; the purposes of particular provisions which those results clearly disclose;

the relations which they evince between the different parts of the system—are all of the utmost importance in determining the sense in which the whole ultimately came before the enacting authority for approval or rejection. If, for example, a majority of the states came to a very early determination that the principle of the government should no longer be that of an exclusive representation of states, but should include a representation of the people of the different states in some fair and equitable ratio; if they adhered to this throughout their deliberations, and adjusted everything with reference to it; and if, when they finally provided for a mode of establishing the new system, they submitted it directly to the people of each state to declare whether they would be so represented, it is manifest that these results of their action have much to do with the inquiry, What is the true nature of the present government of the United States?

Every student of the proceedings and discussions in the national Convention should, however, be careful not to extend this principle of general interpretation to the views, opinions, or arguments expressed or employed by individuals in that assembly. The line of argument or illustration adopted by different members may be more or less important, as tending to explain the scope or purpose of a particular decision arrived at by a vote of the Convention; and occasionally, as will be seen in reference to the arrangements which were finally entered into as mutual concessions or compromises between different interests, the discussions will be found to be of great significance and importance. But it is, after all, to the results themselves, and to the principles involved in the various decisions of the Convention, as indicated by the votes taken, that we are to look for the landmarks that are to guide our inquiries into the fundamental changes, improvements, and additions proposed by the Convention to the country, and afterwards adopted by the people of the states.

## CHAPTER XVIII.

### CONSTRUCTION OF A LEGISLATIVE POWER.—BASIS OF REPRESENTATION, AND RULE OF SUFFRAGE.—POWERS OF LEGISLATION.

THE Convention having been organized, Governor Randolph of Virginia<sup>1</sup> submitted a series of resolutions, embracing the principal changes that ought to be proposed in the structure of the federal system.

Mr. Charles Pinckney of South Carolina also submitted a plan of government, which, with Governor Randolph's resolutions, was referred to a committee of the whole. It is not necessary here to state the details of these several systems; for although that introduced by Randolph gave a direction to the deliberations of the committee, the results arrived at were in some respects materially different.

The first distinct departure that was made from the principles of the Confederation was involved in one of the propositions brought forward by Governor Randolph, "that a NATIONAL government ought to be established, consisting of a supreme legislative, executive, and judiciary;" and as this proposition was affirmed in the committee by a vote of six states, it is important to understand the sense in which it was understood by them.<sup>2</sup>

Most of the framers of the Constitution seem to have considered that a compact between sovereign states, which rested for its efficacy on the good faith of the parties, and had no other compulsory operation than a resort to arms against a delinquent member, was a "federal" government. This was the principle of the Confederation. At this early stage of their deliberations, the idea which

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<sup>1</sup> Edmund Randolph. See ante, p. 310.

<sup>2</sup> Massachusetts, Pennsylvania, Delaware, Virginia, North Carolina, South Carolina, *ay*, 6; Connecticut, *no*, 1; New York divided (Colonel Hamilton *ay*, Mr. Yates *no*). Madison, Elliot, V. 182, 184.

was intended by those who favored a change of that principle, when they spoke of a "national" government, was one that would be a supreme power with respect to certain national objects committed to it, and that would have some kind of direct compulsory action upon individuals. This distinction was understood by all to be real and important. It led directly to the question of the powers of the Convention, and formed the early line of division between those who desired to adhere to the existing system, and those who aimed at a radical change. The former admitted the necessity for a more effective government, and supposed that the Confederation could be made so by distributing its powers into the three great departments of a legislative, executive, and judiciary; but they did not suggest any mode by which those powers could be made supreme over the authority of the separate states. The latter contended that there could be no such thing as government unless it were a supreme power, and that there could be but one supreme power over the same subjects in the same community; that supreme power could not, from the nature of things, act on the states collectively, in the usual and peaceful mode in which the operations of government ought to be conducted, but that it must be able to reach individuals; and that, as the Confederation could not operate in this way, the distribution of its powers into distinct departments would be no improvement upon the present condition of things.

But when the distinction between a national and a federal government had been so far developed, the subject was still left in a great degree vague and indeterminate. What was to mark this distinction as real, and give it practical effect? By what means was the government, which was now, as all admitted, a mere federal league between sovereign states, to become, in any just sense, national? The idea of a nation implies the existence of a people united in their political rights, and possessed of the same political interests. A national government must be one that exercises the political powers, and protects the political interests of such a people. But, hitherto, the people of the United States had been divided into distinct sovereignties; and although by the Articles of Confederation some portion of the sovereign power of each of the separate states had been vested in a general government, that government had been found inefficient, and incapable

of resisting the great power that had been reserved to the respective states, and was constantly exerted by them. The difficulty was, that the constituent parties to the federal union were themselves political governments and sovereigns; the people of the states had no direct representation, and no direct suffrage, in the general legislature; and as in a republican government the representation and the suffrage must determine its character, it became obvious that, in order to establish a national government that would embrace the political rights and interests of the people inhabiting the states, the basis of representation and the rule of suffrage must be changed.

It being assumed that the new government was to be divided into the three departments of the legislative, executive, and judiciary, several questions at once presented themselves with regard to the constitution of the national legislature. Was it to consist of one or of two houses? and if the latter, what was to be the representation and the rule of suffrage in each?

The resolutions of Governor Randolph raised the question as to the rule of suffrage, before the committee had determined on the division of the legislative power into two branches. One of his propositions was, "That the rights of suffrage in the national legislature ought to be proportioned to the quotas of contribution, or to the number of free inhabitants, as the one or the other rule may seem best in different cases." This was no sooner propounded than a difficulty was suggested by the deputies of the state of Delaware which threatened to impede the whole action of the Convention. They declared that they felt restrained by their commissions from assenting to any change of the rule of suffrage, and announced their determination to retire from the Convention if such a change were adopted. The firmness and address of Madison and Gouverneur Morris surmounted this obstacle. They declared that the proposed change was absolutely essential to the formation of a national government; but they consented to postpone the question, having ascertained that it would finally be carried.<sup>1</sup>

The committee thereupon immediately determined that the

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<sup>1</sup> Madison, Elliot, V. 134, 135.



national legislature should consist of two branches,<sup>1</sup> and proceeded to consider the mode of representation and suffrage in both. As the discussions proceeded, the members became divided into two parties upon the general subject; the one was for a popular basis and a proportionate representation in both branches; the other was in favor of an equal representation by states in both. The first issue between them was made upon the House, or what was termed the first branch of the legislature. On the one side it was urged that to give the election of this branch to the people of the states would make the new government too democratic; that the people were unsafe depositaries of such a power, not because they wanted virtue, but because they were liable to be misled; and that the state legislatures would be more likely to appoint suitable persons. On the other hand, it was admitted that an election of the more numerous branch of the national legislature by the people would introduce a true democratic principle into the government, and this, it was said, was necessary. It was urged that this branch of the legislature ought to know and sympathize with every part of the community, and ought therefore to be taken, not only from different parts of the republic, but also from different districts of the larger members of it. The broadest possible basis, it was said, ought to be given to the new system; and as that system was to be republican, a direct representation of the people was indispensable. To increase the weight of the state legislatures, by making them electors of the national legislature, would only perpetuate some of the worst evils of the Confederation.

A decided majority of the states sustained the election of the first branch of the national legislature by the people.<sup>2</sup> Great efforts were, however, subsequently made to change this decision; and the discussion which ensued on a motion that this branch should be elected by the state legislatures throws much light upon the nature of the government which the friends of an election by the people were aiming to establish. From that discus-

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<sup>1</sup> Madison, Elliot, V. 135. The vote of Pennsylvania, in compliance with the wishes of Dr. Franklin, was given for a single house.

<sup>2</sup> Massachusetts, New York, Pennsylvania, Virginia, North Carolina, Georgia, *ay*, 6; New Jersey, South Carolina, *no*, 2; Connecticut and Delaware divided.

sion it appears that the idea was already entertained of forming a government that should have a vigorous authority derived directly from the people of the states—one that should possess both the force and the sense of the people at large. For the formation of such a government one of two courses was necessary: either to abolish the state governments altogether; or to leave them in existence, and to regard the people of each state as competent to withdraw from their local governments such portions of their political power as they might see fit to bestow upon a national government. The latter plan was undoubtedly a novelty in political science; for no system of government had yet been constructed in which the individual stood in the relation of subject to two distinct sovereignties, each possessed of a distinct sphere, and each supreme in its own sphere. But if the American doctrine were true, that all supreme power resides originally in the people, and that all governments are constituted by them as the agents and depositaries of that power, there could be no incompatibility in such a system. The people who had deposited with a state government the sovereign power of their community could withdraw it at their pleasure; and as they could withdraw the whole, they could withdraw a part of it. If a part only were withdrawn, or, rather, if the supreme power in relation to particular objects were to be taken from the state governments and vested in another class of agents, leaving the authority of the former undiminished except as to those particular objects, the individual might owe a double allegiance, but there could be no confusion of his duties, provided the powers withdrawn and re-vested were clearly defined.

The advocates of a national government, besides and beyond the intrusting of a particular jurisdiction to that government, wished to make it certain that its legislative power, in each act of legislation, should rest on the direct authority of the people. For this purpose they desired to avoid all agency of the state governments in the appointment of the members of the national legislature. They held this to be necessary for two reasons. In the first place, they said that in a national government the people must be represented; and that in a republican system the real constituent should act directly, and without any intermediate agency, in the appointment of the representative. In the second

place, they deduced from the objects of a national government the necessity for excluding the agency of the state governments in the appointment of those who were to exercise its legislative power. Those objects, they contended, were not fully stated by their opponents. The latter generally regarded the objects of the Union as confined to defence against foreign danger and internal disorder; the power to make binding treaties with foreign countries; the regulation of commerce, and the power to derive revenues therefrom.<sup>1</sup> The former insisted that another great object must be, to provide more effectually for the security of private rights, and the steady dispensation of justice. Mr. Madison declared that republican liberty could not long exist under the abuses of it which had been practised in some of the states, where the uncontrollable power of a majority had enabled debtors to elude their creditors, the holders of one species of property to oppress the holders of another species, and where paper money had become a stupendous fraud. These evils had made it manifest that the power of the state governments, even in relation to some matters of internal legislation, must be to some extent restrained; and in order effectually to restrain it, the national government must, in the construction of its departments, as well as in its powers, be derived directly from the people.<sup>2</sup>

These views again prevailed as to the first branch, and Mr. Pinckney's proposition for electing that branch by the state legislatures was negatived by a vote of three states in the affirmative and eight in the negative.<sup>3</sup>

But as soon as the impracticability of abolishing the state governments was seen and admitted—and it was at once both seen and admitted by some of the strongest advocates for a national government—it became apparent to a large part of the assembly that to exclude those governments from all agency in the election of both branches of the national legislature would be inexpedient. It would obviously have been theoretically correct to have given

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<sup>1</sup> See Mr. Sherman's remarks, made in committee, June 6; Madison, Elliot, V. 161.

<sup>2</sup> See Mr. Madison's views as stated in his debates, Elliot, V. 161.

<sup>3</sup> Connecticut, New Jersey, South Carolina, *ay*, 3; Massachusetts, New York, Pennsylvania, Delaware, Maryland, Virginia, North Carolina, Georgia, *no*, 8.

the election of both the Senate and the House to the people of the states, especially when it was intended to adhere to the principle of a proportionate representation of the people of the states in both branches.<sup>1</sup> But the necessity for providing some means by which the states, as states, might defend themselves against encroachments of the national government, made it apparent that they must become, in the election, a constituent part of the system. No mode of doing this presented itself, except to give the state legislatures the appointment of the less numerous branch of the national legislature—a provision which was finally adopted in the committee by the unanimous vote of the states.<sup>2</sup>

The results thus reached had settled for the present the very important fact that the people of the states were to be represented in both branches of the legislature; that for the one they were to elect their representatives directly, and for the other they were to be elected by the legislature of the state.

But when it had been ascertained by whom the members of the two branches were to be elected, there remained to be determined the decisive question which was to mark still more effectively the distinction between a purely national and a purely federal government, namely, the rule of suffrage, or the ratio of representation in the national legislature.

The rule of suffrage adopted in the first Continental Congress was, as we have seen, the result of necessity; for it was impossible to ascertain the relative importance of each colony; and, moreover, that Congress was in fact an assembly of committees of the different colonies, called together to deliberate in what mode they could aid each other in obtaining a redress of their several grievances from Parliament and the crown. But while, from the necessity of the case, they assigned to each colony one vote in the Congress, they looked forward to the time when the relative wealth or population of the colonies must regulate their suffrage in any future system of continental legislation.<sup>3</sup> The character of the government formed by the Articles of Confederation had operated to postpone the arrival of this period; be-

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<sup>1</sup> Mr. Wilson was in favor of this plan, and Mr. Madison seems to have favored it.

<sup>2</sup> Madison, Elliot, V. 170.

<sup>3</sup> Ante, pp. 10, 11.

cause it was in the very nature of that system that each state should have an equal voice with every other. This system was the result of the formation of the state governments, each of which had become the present depositary of the political powers of an independent people.

But if this system were to be changed—if the people of the states were to be represented in each branch of the national legislature—some ratio of representation must be adopted, or the idea of connecting them as a nation with the government that was to be instituted must be abandoned. It was obviously for the interest of the larger states, such as Virginia, Pennsylvania, and Massachusetts—then the three leading states in point of population—to have a proportionate representation of their whole inhabitants, without reference to age, sex, or condition. On the other hand, it was for the interest of the smaller states to insist on an equality of votes in the national legislature, or at least on the adoption of a ratio that would exclude some portions of the population of the great states. Some of the lesser states were exceedingly strenuous in their efforts to accomplish these objects, and more than once, in the course of the proceedings, declared their purpose to form a union on no other basis.

In this posture of things the alternatives were, either to form no union at all, or only to form one between the large states willing to unite on the basis of proportionate representation; or to abolish the state governments, and throw the whole into one mass; or to leave the distinctions and boundaries between the different states, and adopt some equitable ratio of suffrage, as between the people of the several states, in the national legislature. The latter course was adopted in the committee, as to the first branch, by a vote of seven states in the affirmative, against three in the negative, one being divided.<sup>1</sup>

The question was then to be determined, by what ratio the representation of the different states should be regulated; and here again any one of several expedients might be adopted. The basis of representation might be made to consist of the whole

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<sup>1</sup> Massachusetts, Connecticut, Pennsylvania, Virginia, North Carolina, South Carolina; Georgia, *ay*, 7; New York, New Jersey, Delaware, *no*, 3; Maryland, divided.

number of voters, or those on whom the states had conferred the elective franchise; or it might be confined to the white inhabitants, excluding all other races; or it might include all the free inhabitants of every race, excluding only the slaves; or it might embrace the whole population of each state. Some examination of each of these plans will illustrate the difficulties which had to be encountered.

To have adopted the number of legal voters of the states as the ratio of representation in the national legislature would have been to adopt a system in which there were great existing inequalities. The elective franchise had been conferred in the different states upon very different principles; it was very broad in some of the states, and much narrower in others, according to their peculiar policy and manners. These inequalities could scarcely have been removed; for the right of suffrage in some of the states was more or less connected with their systems of descent and distribution of property, and those systems could not readily be changed, so as to adapt the condition of society to the new interest of representation and influence in the general government. This plan was, therefore, out of the question.

It was nearly as impracticable, also, to confine the basis of representation to the white inhabitants of the states. Some of the states—such as Massachusetts, Connecticut, Rhode Island, New York, and Pennsylvania, in which slavery was already, or was ultimately to become, extinct, and Maryland, North Carolina, and Virginia, where slavery was likely to remain—had large numbers of free blacks. These inhabitants, who were regarded as citizens in some of the states, but not in others, were in all a part of their populations, contributing to swell the aggregate of the numbers and wealth of the state, and thus to raise it in the scale of relative rank. Their personal consequence, or social rank, was a thing too remote for special inquiry. A state that contained five or ten thousand of these inhabitants might well say that, although of a distinct race, they formed an aggregate portion of its free population, too large to be omitted without opening the door to inquiries into the condition and importance of other classes of its free inhabitants. This was the situation of all the Northern States except New Hampshire, as well as of all the Middle and Southern States; and it was especially true of Virginia, which had nearly

twice as many free colored persons as any other state in the Union.

It was equally impracticable to form a national government in which the basis of representation should be confined to the free inhabitants of the states. The five states of Maryland, Virginia, North Carolina, South Carolina, and Georgia, including their slaves, were found by the first census, taken three years after the formation of the Constitution, to contain a fraction less than one half of the whole population of the Union.<sup>1</sup> In three of those states the slaves were a little less than half, and in two of them they were more than half, as numerous as the whites.<sup>2</sup> There was no good reason, therefore—except the theoretical one that a slave can have no actual voice in government, and consequently does not need to be represented—why a class of states containing nearly half of the whole population of the Confederacy should consent to exclude such large masses of their populations from the basis of representation, and thereby give to the free inhabitants of each of the other eight states a relatively larger share of legislative power than would fall to the free inhabitants of the states thus situated. The objection arising from the political and social condition of the slaves would have had great weight, and, indeed, ought to have been decisive of the question, if the object had been to efface the boundaries of the states, and to form a purely consolidated republic. But this purpose, if ever entertained at all, could not be followed by the framers of the Constitution. They found it indispensable to leave the states still in possession of their distinct political organizations, and of all the sovereignty not necessary to be conferred on the central power, which they were endeavoring to create by bringing the free people of these several communities into some national relations with each other. It became necessary, therefore, to regard the peculiar social condition of each of the states, and to construct a system of representation that would place the free inhabitants of each distinct state upon as near a footing of political equality with the free inhabitants of the other states as might, under such circumstances, be practicable. This

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<sup>1</sup> They contained 1,793,407 inhabitants; the other eight states had 1,845,595 when the federal census of 1790 was taken.

<sup>2</sup> See the census of 1790, post, p. 348.

could only be done by treating the slaves as an integral part of the population of the states in which they were found, and by assuming the population of the states as the true basis of their relative representation.

It was upon this idea of treating the slaves as inhabitants, and not as chattels or property, that the original decision was made in the committee of the whole, by which it was at first determined to include them.<sup>1</sup> Having decided that there ought to be an equitable ratio of representation, the committee went on to declare that the basis of representation ought to include the whole number of white and other free citizens and inhabitants, of every age, sex, and condition, including those bound to servitude for a term of years; and they then added to the population thus described three fifths of all other persons not comprehended in that description, except Indians not paying taxes. The proportion of three fifths was borrowed from a rule which had obtained the sanction of nine states in Congress, in the year 1783, when it was proposed to change the basis of contribution by the states to the expenses of the Union from property to population.<sup>2</sup> At that time the slaveholding states had consented that three fifths of their slaves should be counted in the census which was to fix the amount of their contributions; and they now asked that, in the apportionment of representatives, these persons might still be regarded as inhabitants of the state in the same ratio. The rule was adopted in the committee, with the dissent of only two states, New Jersey and Delaware; but on the original question of substituting an equitable ratio of representation for the equality of suffrage that prevailed under the Confederation, New York united with New Jersey and Delaware in the opposition, and the vote of Maryland was divided.

The next step was to settle the rule of suffrage in the Senate;

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<sup>1</sup> The population of the states was adopted in the committee of the whole, instead of their quotas of contribution, which, in one or another form, was the alternative proposition. The slaves were included, in a proportion accounted for in the text, as a part of the aggregate *population*; and it was not until a subsequent stage of the proceedings that this result was defended on the ground of their forming part of the aggregate *wealth* of the state.

<sup>2</sup> Ante, p. 144, note 2, where the origin of the proportion of three fifths is explained.



and, although it was earnestly contended that the smaller states would never agree to any other principle than an equality of votes in that body,<sup>1</sup> it was determined in the committee, by a vote of six states against five, that the ratio of representation should be the same as in the first branch.<sup>2</sup>

Thus it appears that originally a majority of the states were in favor of a numerical representation in both branches. The three states of Virginia, Pennsylvania, and Massachusetts, the leading states in population, and with them North Carolina, South Carolina, and Georgia, found it at present for their interest to adopt this basis for both houses of the national legislature. It was a consequence of the principle of numerical representation that the slaves should be included; and it does not appear that at this time any delegate from a Northern state interposed any objection, except Mr. Gerry of Massachusetts, who regarded the slaves as "property," and said that the cattle and horses of the North might as well be included. But the state which he represented was at this time pressing for the rights of population, and for a system in which population should have its due influence; and her vote, as well as that of Pennsylvania, was accordingly given for the principle which involved an admission of the slaves into the basis of representation, and for the proportion which the slave states were willing to take.

These transactions in the committee of the whole are quite important, because they show that the original line of division between the states, on the subject of representation, was drawn between the states having the preponderance of population and the states that were the smallest in point of numbers. When and under what circumstances this line of division changed, what combinations a nearer view of all the consequences of numerical representation may have brought about, and how the conflicting interests were finally reconciled will be seen hereafter. What we are here to record is the declaration of the important principle that the legislative branch of the government was to be one in

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<sup>1</sup> By Mr. Sherman and Mr. Ellsworth.

<sup>2</sup> Massachusetts, Pennsylvania, Virginia, North Carolina, South Carolina, Georgia, *ay*, 6; Connecticut, New York, New Jersey, Delaware, Maryland, *no*, 5. Elliot, V. 182.

which the free people of the states were to be represented, and to be represented according to the numbers of the inhabitants which their respective states contained, counting those held in servitude in a certain ratio only.

The general principles on which the powers of the national legislature were to be regulated were declared with a great degree of unanimity. That it ought to be invested with all the legislative powers belonging to the Congress of the Confederation was conceded by all. This was followed by the nearly unanimous declaration of a principle, which was intended as a general description of a class of powers that would require subsequent enumeration, namely, that the legislative power ought to embrace all cases to which the state legislatures were incompetent, or in which the harmony of the United States would be interrupted by the exercise of state legislation. But the committee also went much further, and without discussion or dissent declared that there ought also to be a power to negative all laws passed by the several states contravening, in the opinion of the national legislature, the Articles of Union, or any treaties made under the authority of the Union.<sup>1</sup>

The somewhat crude idea of making a negative on state legislation a legislative power of the national government shows that the admirable discovery had not yet been made of exercising such a control through the judicial department. Without such a control lodged somewhere, the national prerogatives could not be defended, however extensive they might be in theory. There had been, as Mr. Madison well remarked, a constant tendency in the states to encroach on the federal authority, to violate national treaties, to infringe the rights and interests of each other, and to oppress the weaker party within their respective jurisdictions. The expedient that seemed at first to be the proper remedy, and, as was then supposed, the only one that could be employed as a substitute for force, was to give the general government a power similar to that which had been exercised over the legislation of the colonies by the crown of England, before the Revolution; and there were some important members of the Convention who at this time thought that this power ought to be universal.<sup>2</sup> They

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<sup>1</sup> Madison, Elliot, V. 139.

<sup>2</sup> Mr. Madison, Mr. Wilson, Mr. C. Pinckney, Mr. Dickinson. On the other

considered it impracticable to draw a line between the cases proper and improper for the exercise of such a negative, and they argued from the correctness of the principle of such a power that it ought to embrace all cases.

But here the complex nature of the government which they were obliged to establish made it necessary to depart from the theoretical correctness of a general principle. The sovereignty of the states would be entirely inconsistent with a power in the general government to control their whole legislation. As the direct authority of the national legislature was to extend only to certain objects of national concern, or to such as the states were incompetent to provide for, all the political powers of the states, the surrender of which was not involved in the grant of powers to the national head, must remain; and if a general superintendence of state legislation were added to the specific powers to be conferred on the central authority, there would be in reality but one supreme power in all cases in which the general government might see fit to exercise its prerogative. The just and proper sphere of the national government must be the limit of its power over the legislation of the states. In that sphere it must be supreme, as the power of each state within its own sphere must also be supreme. Neither of them should encroach upon the prerogatives of the other; and while it was undoubtedly necessary to arm the national government with some power to defend itself against such encroachments on the part of the states, there could be no real necessity for making this power extend beyond the exigencies of the case. Those exigencies would be determined by the objects that might be committed to the legislation of the central authority; and if a mode could be devised, by which the states could be restrained from interfering with or interrupting the just exercise of that authority, all that was required would be accomplished.<sup>1</sup>

But to do this by means of a negative that was to be classed

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hand, Mr. Williamson, Mr. Sherman, Mr. Bedford, and Mr. Butler strenuously opposed this plan.

<sup>1</sup> Accordingly, a proposition to extend the negative on state legislation to all cases received the votes of three states only, viz., Massachusetts, Pennsylvania, and Virginia.

among the legislative powers of the new government, was to commit the subject of a supposed conflict between the rights and powers of the state and the national governments to an unfit arbitration. Such a question is of a judicial nature, and belongs properly to a department that has no direct interest in maintaining or enlarging the prerogatives of the government whose powers are involved in it.

But the framers of the Constitution had come fresh from the inconveniences and injustice that had resulted from the unrestrained legislative powers of the states. Some of them believed it, therefore, to be necessary to make the authority of the United States paramount over the authority of each separate state; and a negative upon state legislation, to be exercised by the legislative branch of the national government seemed to be the readiest way of accomplishing the object. Some of the suggestions of the mode in which this power was to operate strike us, at the present day, as singularly strange. No less a person than Mr. Madison, in answer to the objections arising from the practical difficulties in subjecting all the legislation of all the states to the revision of a central power, thought at this time that something in the nature of a commission might be issued into each state, in order to give a temporary assent to laws of urgent necessity. He suggested also that the negative might be lodged in the Senate, in order to dispense with constant sessions of the more numerous branch.

But the radical objection to any plan of a negative on state legislation, as a legislative power of the general government, was, that it would not in fact dispense with the use of force against a state in the last resort. If, after the exercise of the power, the state whose obnoxious law had been prohibited should see fit to persist in its course, force must be resorted to as the only ultimate remedy. How different, how wise, was the expedient subsequently devised, when the appropriate office of the judicial power was discerned—a power that waits calmly until the clashing authorities of the state and the nation have led to a conflict of right or duty in some individual case, and then peacefully adjudicates, in a case of private interest, the great question, with which of the two governments resides the power of prescribing the paramount rule of conduct for the citizen! Disobedience on the part of the

state may, it is true, still follow after such an adjudication, and against an open array of force on the one side nothing but force remains to be employed on the other. But the great preventive of this dread necessity is found in the fact that there has been an adjudication by a tribunal that commands the confidence of all, and in the moral influence of judicial determinations over a people accustomed to submit not only their interests, but their feelings even, to the arbitrament of juridical discussion and decision.

TABLE

EXHIBITING THE POPULATIONS OF THE THIRTEEN STATES, ACCORDING TO THE CENSUS OF 1790.

N.B.—In this abstract Maine is not included in Massachusetts, nor Kentucky and Tennessee in the states from which they were severed.

	Whites.	Free Colored.	Slaves.	Total.
New Hampshire.....	141,111	630	158	141,899
Massachusetts.....	373,254	5,463	.....	378,717
Rhode Island.....	64,689	3,469	952	69,110
Connecticut.....	232,581	2,801	2,759	238,141
New York.....	314,142	4,654	21,324	340,120
New Jersey.....	169,954	2,762	11,423	184,139
Pennsylvania.....	424,099	6,537	3,737	434,373
Delaware.....	46,310	3,899	8,887	59,096
Maryland.....	208,649	8,043	103,036	319,728
Virginia.....	442,115	12,765	293,427	748,307
North Carolina.....	288,204	4,975	100,572	393,751
South Carolina.....	140,178	1,801	107,094	249,073
Georgia.....	52,886	398	29,264	82,548
Aggregate.....	2,898,172	58,197	682,633	3,639,002

Total population of the eight states in 1790, in which slavery had been or was afterwards abolished, 1,845,595.

Total population of the five states in 1790, in which slavery existed and continued to exist, 1,793,407.

## CHAPTER XIX.

### CONSTRUCTION OF THE EXECUTIVE AND THE JUDICIARY.

THE construction of a national executive, although not surrounded by so many inherent practical difficulties as the formation of the legislative department, was likely to give rise to a great many opposite theories. The questions, of how many persons the executive ought to consist, in what mode the appointment should be made, and what were to be its relations to the legislative power, were attended with great diversities of opinion.

The question whether the executive should consist of one, or of more than one person, was likely to be influenced by the nature of the powers to be conferred upon the office. Foreseeing that it must necessarily be an office of great power, some of the members of the Convention thought that a single executive would approach too nearly to the model of the British government. These persons considered that the great requisites for an executive department—vigor, despatch, and responsibility—could be found in three persons as well as in one. Those, on the other hand, who favored the plan of a single magistrate, maintained that the prerogatives of the British monarchy would not necessarily furnish the model for the executive powers; and that unity in the executive would be the best safeguard against tyranny.

But this point connected itself with the question whether the executive should be surrounded by a council, and the latter proposition again involved the consideration of the precise relation of the executive to the legislative power. That a negative of some kind upon the acts of the legislature was essential to the independence of the executive was a truth in political science not likely to escape the attention of many of the members of the Convention. Whether it should be a qualified or an absolute negative was the real, and almost the sole question; for although there were some who held the opinion that no such power ought

to be given, it was evident from the first that its necessity was well understood by the larger part of the assembly. In the first discussion of this subject, the negative was generally regarded as a means of defence against encroachments of the legislature on the rights and powers of the other departments. It was supposed that, although the boundaries of the legislative authority might be marked out in the Constitution, the executive would need some check against unconstitutional interference with its own prerogatives; and that, as the judicial department might be exposed to the same dangers, the power of resisting these also could be best exercised by the executive. But an absolute negative for any purpose was favored by only a very few of the members, and the proposition first adopted was to give the executive alone a revisionary check upon legislation, which should not be absolute if it were afterwards overruled by two thirds of each branch of the legislature.<sup>1</sup>

But inasmuch as this provision would leave the precise purposes of the check undetermined, and in order, as it would seem, to subject the whole of the legislative acts to revision and control by the executive, some of the members desired that the judiciary, or a convenient number of the judges, might be added to the executive as a council of revision. Among these persons were Mr. Madison and Mr. Wilson. The former expressed a very decided opinion that, whether the object of a revisionary power was to restrain the encroachments of the legislature on the other departments, or on the rights of the people at large, or to prevent the passage of laws unwise in principle or incorrect in form, there would be great utility in annexing the wisdom and weight of the judiciary to the executive. But this proposition was rejected by a large majority of the states, and the power was left by the committee as it had been settled by their former decision. These proceedings, however, do not furnish any decisive evidence of the nature and purpose of the revisionary check.

But before this feature of the Constitution had been settled by the committee, they had determined on a mode in which the executive should be appointed. It is singular that the idea of an

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election of the executive by the people, either mediately or immediately, found so little favor at first that on its first introduction it received the votes of but two states. Since the executive was to be the agent of the legislative will, it was argued by some members that it ought to be wholly dependent, and ought therefore to be chosen by the legislature. The experience of New York and of Massachusetts, on the other hand—where the election of the first magistrate by the people had been successfully practised—and the danger that the legislature and the candidates might play into each other's hands, and thus give rise to constant intrigues for the office, were the arguments employed by others. Upon the introduction of a proposition that the states be divided into districts, for the election by the people of electors of the executive, two states only recorded their votes in its favor, and eight states voted against it.<sup>1</sup> By the vote of eight states it was then determined that the executive should be elected by the national legislature for the term of seven years;<sup>2</sup> and subsequently it was determined that the executive should be ineligible to a second term of office, and should be removable on impeachment and conviction of malpractice or neglect of duty. A single executive was agreed to by a vote of seven states against three.<sup>3</sup> After the mode in which the negative was to be exercised had been settled, an attempt was made to change the appointment, and vest it in the executives of the states. But this proposal was decisively rejected.<sup>4</sup>

The judiciary was the next department of the proposed plan of government that remained to be provided. Like the executive, it was a branch of sovereign power unknown to the Confederation. The most palpable defect of that government, as I have more than once had occasion to observe, was the entire want of sanction to its laws. It had no judicial system of its own for decree and execution against individuals. All its legislation, both in nature and form, prescribed duties to states. The observance of these duties could only be enforced against the parties on whom they rested, and this could be done only by military power. But

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<sup>1</sup> Pennsylvania, Maryland, *ay*, 2; Massachusetts, Connecticut, New York, Delaware, Virginia, North Carolina, South Carolina, Georgia, *no*, 8.

<sup>2</sup> Pennsylvania and Maryland, *no*.

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<sup>4</sup> Nine states voted against it, and one (Delaware) was divided.



it was the peculiar and anomalous situation of the American Confederacy that the power to employ force against its delinquent members had not been expressly delegated to it by the Articles of Union; and that it could not be implied from the general purposes and provisions of that instrument without a seeming infraction of the article by which the states had reserved to themselves every power, jurisdiction, and right not "expressly" delegated to the United States. If this objection was well founded—and it was universally held to be so—we may well concur in the remark of the *Federalist*, that "the United States presented the extraordinary spectacle of a government destitute even of the shadow of constitutional power to enforce the execution of its own laws."<sup>1</sup>

The Confederation, too, had found it to be entirely impracticable to rely on the tribunals of the states for the execution of its laws. Such a reliance in a confederated government presupposes that the party guilty of an infraction of the laws or ordinances of the confederacy will try, condemn, and punish itself. The whole history of our Confederation evinces the futility of laws requiring the obedience of states, and proceeding upon the expectation that they will enforce that obedience upon themselves.

The necessity for a judicial department in the general government was, therefore, one of the most prominent of those "exigencies of the Union" for which it was the object of the present undertaking to provide. The place which that department was to occupy in a national system could be clearly deduced from the office of the judiciary in all systems of constitutional government. That office is to apply to the subjects of the government the penalties inflicted by the legislative power for disobedience of the laws. Disobedience of the lawful commands of a government may be punished or prevented in two modes. It may be done by the application of military power, without adjudication; or it may be done through the agency of a tribunal, which adjudicates, ascertains the guilty parties, and applies to them the coercion of the civil power. This last is the peculiar function of a judiciary; and, in order that it may be discharged effectually, the judiciary that is to perform this office must be a part of the government

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<sup>1</sup> The *Federalist*, No. 21.

whose laws it is to enforce. It is essential to the supremacy of a government that it should adjudicate on its own powers and enforce its own laws; for if it devolves this prerogative on another and subordinate authority the final sanction of its laws can only be by a resort to military power directed against those who have refused to obey its lawful commands.

One of the leading objects in forming the Constitution was to obtain for the United States the means of coercion without a resort to force against the people of the states collectively. Mr. Madison, at a very early period in the deliberations of the Convention, declared that the use of force against a state would be more like a declaration of war than an infliction of punishment, and would probably be considered by the party attacked as a dissolution of all previous compacts by which it might be bound.<sup>1</sup> At his suggestion a clause in Governor Randolph's plan authorizing the use of force against a delinquent member of the Confederacy was laid aside, in order that a system might be framed which would render it unnecessary. This could be done only by making the authority of the government supreme in relation to the rights and powers that might be committed to it; and it could be made so only by applying its legislation to individuals through the intervention of a judiciary. A confederacy whose legislative power operates only upon states, or upon masses of people in a collective capacity, can be supreme only so far as it can employ superior force; and when the issue that is to determine the question of supremacy is once made up in that form there is an actual civil war.

The introduction, therefore, of a judicial department into the new plan of government of itself evinces an intention to clothe that government with powers that could be executed peacefully, and without the necessity of putting down the organized opposition of subordinate communities. By their resort to this great instrumentality we may perceive how much, in this particular, the framers of the Constitution were aided by the spirit and forms of the institutions which the people of these states had already framed for their separate governments. The common law, which the founders of all these states had brought with them to this country, had accustomed them to regard the judiciary as clothed

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<sup>1</sup> Madison, Elliot, V. p. 140.

with functions in which two important objects were embraced. By the known course of that jurisprudence the judiciary is, in the first place, the department which declares the construction of the laws; and, in the second place, when that department has announced the construction of a law, it is not only the particular case that is settled, but the rule is promulgated that is to determine all future cases of the same kind arising under the same law. Thus the judiciary, in governments whose adjudications proceed upon the course of the common law, becomes not merely the arbitrator in a particular controversy, but the department through which the government interprets the rule of action prescribed by the legislature, and by which all its citizens are to be guided. This office of the judicial department had long been known in all the states of the Union at the time of the formation of the national Constitution.

By the introduction of this department into their plan of government the framers of the Constitution obviously intended that it should perform the same office in their national system which the corresponding department had always fulfilled in the states. No other function of a judiciary was known to the people of the United States, and this function was both known and deemed essential to a well-regulated liberty. It was known that the judicial department of a government is that branch by which the meaning of its laws is ascertained, and applied to the conduct of individuals. To effect this, it was introduced into the system whose gradual formation and development we are now examining.

The committee not only declared that this department, like the legislative and the executive, was to be "supreme," but they proceeded to make it so. One of the first questions that arose concerning the construction of the judiciary was, whether it should consist solely of one central tribunal, to which appeals might be carried from the state courts, or should also embrace inferior tribunals to be established within the several states. The latter plan was resisted as an innovation which, it was said, the states would not tolerate. But the necessity for an effective judiciary establishment commensurate with the legislative authority was generally admitted, and a large majority of the states were found to be in favor of conferring on the national legislature power

to establish inferior tribunals ;<sup>1</sup> while the provision for a supreme central tribunal was to be made imperative by the Constitution.

The intention of the committee also to make the judicial coextensive with the legislative authority appears from the definition which they gave to both. Upon the national legislature they proposed to confer, in addition to the rights vested in Congress by the Confederation, power to legislate in all cases to which the separate states were incompetent, or in which the harmony of the United States might be interrupted by the exercise of individual legislation ; and the further power to negative all laws passed by the several states contravening, in the opinion of the national legislature, the Articles of Union, or any treaties subsisting under the authority of the Union. The jurisdiction of the national judiciary, it was declared, should extend to all cases which respect the collection of the national revenue and to impeachments of national officers ; and then the comprehensive addition was made of "questions which involve the national peace and harmony." This latter provision placed the general objects which, it was declared, ought to be embraced by the legislative power, within the cognizance of the judiciary. Those objects were not yet described in detail, the purpose being merely to settle and declare the principles on which the powers of both departments ought to be founded.

But, as we have already had occasion to see, the idea of vesting in the judicial department such control over the legislation of the separate states as might be surrendered by them to the national government was not yet propounded. The principle which was to ascertain the extent of that control was already introduced and acted upon, namely, that it should embrace all laws of the states which might conflict with the Constitution or the treaties made under the national authority. The plan at present was, as we have seen, to treat this as a legislative power, to be executed by the direct control of a negative. But a nearer view of the great inconveniences of such an arrangement, and the general basis of the jurisdiction already marked out for the national judiciary, led to the development of the particular feature which was required as a substitute for direct interference with the legislative powers of the states. In truth, the important principle which proposed

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<sup>1</sup> Eight states in the affirmative, two in the negative, and one divided.

to extend the judicial authority to questions involving the national peace and harmony embraced all the power that was required; and it only remained to be seen that the exercise of that power by the indirect effect of judicial action on the laws of the states after they had been passed was far preferable to a direct interference with those laws while in the process of enactment.

The committee, with complete unanimity, determined that the judges of the supreme tribunal should hold their offices during good behavior.<sup>1</sup> This tenure of office was taken from the English statutes, and from the constitutions of some of the states which had already adopted it. The commissions of the judges in England, until the year 1700, were prescribed by the crown; and although they were sometimes issued to be held during good behavior, they were generally issued during the pleasure of the crown, and it was always optional with the crown to adopt the one or the other tenure, as it saw fit. But in the statute passed in the thirteenth year of the reign of William III., which finally secured the ascendancy of the Protestant religion in that country, and made other provisions for the rights and liberties of the subject, it was enacted that judges' commissions should be made during good behavior, and that their salaries should be ascertained and established; but it was made lawful for the crown to remove them upon the address of both houses of Parliament.<sup>2</sup> Still, however, it was always considered that the commissions of the judges expired on the death of the king; and for the purpose of preventing this, and in order to make the judges more effectually independent, a new statute, passed in the first year of the reign of George III., declared that the commissions of the judges should continue in force during their good behavior, notwithstanding the demise of the crown; and that such salaries as had been once granted to them should be paid in all future time, so long as their commissions should remain in force. The provision which made them removable by the crown on the address of both houses of Parliament was retained and re-enacted.<sup>3</sup>

In framing the Constitution of the United States, the objectionable feature of the English system was rejected, and its valuable

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<sup>1</sup> This was afterwards applied to the judges of the inferior courts also.

<sup>2</sup> Act 12 and 13 William III., ch. 2.

<sup>3</sup> Act 1 Geo. III., ch. 23.

## CHAPTER XIX.

### CONSTRUCTION OF THE EXECUTIVE AND THE JUDICIARY.

THE construction of a national executive, although not surrounded by so many inherent practical difficulties as the formation of the legislative department, was likely to give rise to a great many opposite theories. The questions, of how many persons the executive ought to consist, in what mode the appointment should be made, and what were to be its relations to the legislative power, were attended with great diversities of opinion.

The question whether the executive should consist of one, or of more than one person, was likely to be influenced by the nature of the powers to be conferred upon the office. Foreseeing that it must necessarily be an office of great power, some of the members of the Convention thought that a single executive would approach too nearly to the model of the British government. These persons considered that the great requisites for an executive department—vigor, despatch, and responsibility—could be found in three persons as well as in one. Those, on the other hand, who favored the plan of a single magistrate, maintained that the prerogatives of the British monarchy would not necessarily furnish the model for the executive powers; and that unity in the executive would be the best safeguard against tyranny.

But this point connected itself with the question whether the executive should be surrounded by a council, and the latter proposition again involved the consideration of the precise relation of the executive to the legislative power. That a negative of some kind upon the acts of the legislature was essential to the independence of the executive was a truth in political science not likely to escape the attention of many of the members of the Convention. Whether it should be a qualified or an absolute negative was the real, and almost the sole question; for although there were some who held the opinion that no such power ought

to be given, it was evident from the first that its necessity was well understood by the larger part of the assembly. In the first discussion of this subject, the negative was generally regarded as a means of defence against encroachments of the legislature on the rights and powers of the other departments. It was supposed that, although the boundaries of the legislative authority might be marked out in the Constitution, the executive would need some check against unconstitutional interference with its own prerogatives; and that, as the judicial department might be exposed to the same dangers, the power of resisting these also could be best exercised by the executive. But an absolute negative for any purpose was favored by only a very few of the members, and the proposition first adopted was to give the executive alone a revisionary check upon legislation, which should not be absolute if it were afterwards overruled by two thirds of each branch of the legislature.<sup>1</sup>

But inasmuch as this provision would leave the precise purposes of the check undetermined, and in order, as it would seem, to subject the whole of the legislative acts to revision and control by the executive, some of the members desired that the judiciary, or a convenient number of the judges, might be added to the executive as a council of revision. Among these persons were Mr. Madison and Mr. Wilson. The former expressed a very decided opinion that, whether the object of a revisionary power was to restrain the encroachments of the legislature on the other departments, or on the rights of the people at large, or to prevent the passage of laws unwise in principle or incorrect in form, there would be great utility in annexing the wisdom and weight of the judiciary to the executive. But this proposition was rejected by a large majority of the states, and the power was left by the committee as it had been settled by their former decision. These proceedings, however, do not furnish any decisive evidence of the nature and purpose of the revisionary check.

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election of the executive by the people, either mediately or immediately, found so little favor at first that on its first introduction it received the votes of but two states. Since the executive was to be the agent of the legislative will, it was argued by some members that it ought to be wholly dependent, and ought therefore to be chosen by the legislature. The experience of New York and of Massachusetts, on the other hand—where the election of the first magistrate by the people had been successfully practised—and the danger that the legislature and the candidates might play into each other's hands, and thus give rise to constant intrigues for the office, were the arguments employed by others. Upon the introduction of a proposition that the states be divided into districts, for the election by the people of electors of the executive, two states only recorded their votes in its favor, and eight states voted against it.<sup>1</sup> By the vote of eight states it was then determined that the executive should be elected by the national legislature for the term of seven years;<sup>2</sup> and subsequently it was determined that the executive should be ineligible to a second term of office, and should be removable on impeachment and conviction of malpractice or neglect of duty. A single executive was agreed to by a vote of seven states against three.<sup>3</sup> After the mode in which the negative was to be exercised had been settled, an attempt was made to change the appointment, and vest it in the executives of the states. But this proposal was decisively rejected.<sup>4</sup>

The judiciary was the next department of the proposed plan of government that remained to be provided. Like the executive, it was a branch of sovereign power unknown to the Confederation. The most palpable defect of that government, as I have more than once had occasion to observe, was the entire want of sanction to its laws. It had no judicial system of its own for decree and execution against individuals. All its legislation, both in nature and form, prescribed duties to states. The observance of these duties could only be enforced against the parties on whom they rested, and this could be done only by military power. But

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it was the peculiar and anomalous situation of the American Confederacy that the power to employ force against its delinquent members had not been expressly delegated to it by the Articles of Union ; and that it could not be implied from the general purposes and provisions of that instrument without a seeming infraction of the article by which the states had reserved to themselves every power, jurisdiction, and right not "expressly" delegated to the United States. If this objection was well founded—and it was universally held to be so—we may well concur in the remark of the Federalist, that "the United States presented the extraordinary spectacle of a government destitute even of the shadow of constitutional power to enforce the execution of its own laws."<sup>1</sup>

The Confederation, too, had found it to be entirely impracticable to rely on the tribunals of the states for the execution of its laws. Such a reliance in a confederated government presupposes that the party guilty of an infraction of the laws or ordinances of the confederacy will try, condemn, and punish itself. The whole history of our Confederation evinces the futility of laws requiring the obedience of states, and proceeding upon the expectation that they will enforce that obedience upon themselves.

The necessity for a judicial department in the general government was, therefore, one of the most prominent of those "exigencies of the Union" for which it was the object of the present undertaking to provide. The place which that department was to occupy in a national system could be clearly deduced from the office of the judiciary in all systems of constitutional government. That office is to apply to the subjects of the government the penalties inflicted by the legislative power for disobedience of the laws. Disobedience of the lawful commands of a government may be punished or prevented in two modes. It may be done by the application of military power, without adjudication ; or it may be done through the agency of a tribunal, which adjudicates, ascertains the guilty parties, and applies to them the coercion of the civil power. This last is the peculiar function of a judiciary ; and, in order that it may be discharged effectually, the judiciary that is to perform this office must be a part of the government

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One of the leading objects in forming the Constitution was to obtain for the United States the means of coercion without a resort to force against the people of the states collectively. Mr. Madison, at a very early period in the deliberations of the Convention, declared that the use of force against a state would be more like a declaration of war than an infliction of punishment, and would probably be considered by the party attacked as a dissolution of all previous compacts by which it might be bound.<sup>1</sup> At his suggestion a clause in Governor Randolph's plan authorizing the use of force against a delinquent member of the Confederacy was laid aside, in order that a system might be framed which would render it unnecessary. This could be done only by making the authority of the government supreme in relation to the rights and powers that might be committed to it; and it could be made so only by applying its legislation to individuals through the intervention of a judiciary. A confederacy whose legislative power operates only upon states, or upon masses of people in a collective capacity, can be supreme only so far as it can employ superior force; and when the issue that is to determine the question of supremacy is once made up in that form there is an actual civil war.

The introduction, therefore, of a judicial department into the new plan of government of itself evinces an intention to clothe that government with powers that could be executed peacefully, and without the necessity of putting down the organized opposition of subordinate communities. By their resort to this great instrumentality we may perceive how much, in this particular, the framers of the Constitution were aided by the spirit and forms of the institutions which the people of these states had already framed for their separate governments. The common law, which the founders of all these states had brought with them to this country, had accustomed them to regard the judiciary as clothed

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with functions in which two important objects were embraced. By the known course of that jurisprudence the judiciary is, in the first place, the department which declares the construction of the laws; and, in the second place, when that department has announced the construction of a law, it is not only the particular case that is settled, but the rule is promulgated that is to determine all future cases of the same kind arising under the same law. Thus the judiciary, in governments whose adjudications proceed upon the course of the common law, becomes not merely the arbitrator in a particular controversy, but the department through which the government interprets the rule of action prescribed by the legislature, and by which all its citizens are to be guided. This office of the judicial department had long been known in all the states of the Union at the time of the formation of the national Constitution.

By the introduction of this department into their plan of government the framers of the Constitution obviously intended that it should perform the same office in their national system which the corresponding department had always fulfilled in the states. No other function of a judiciary was known to the people of the United States, and this function was both known and deemed essential to a well-regulated liberty. It was known that the judicial department of a government is that branch by which the meaning of its laws is ascertained, and applied to the conduct of individuals. To effect this, it was introduced into the system whose gradual formation and development we are now examining.

The committee not only declared that this department, like the legislative and the executive, was to be "supreme," but they proceeded to make it so. One of the first questions that arose concerning the construction of the judiciary was, whether it should consist solely of one central tribunal, to which appeals might be carried from the state courts, or should also embrace inferior tribunals to be established within the several states. The latter plan was resisted as an innovation which, it was said, the states would not tolerate. But the necessity for an effective judiciary establishment commensurate with the legislative authority was generally admitted, and a large majority of the states were found to be in favor of conferring on the national legislature power

to establish inferior tribunals ;<sup>1</sup> while the provision for a supreme central tribunal was to be made imperative by the Constitution.

The intention of the committee also to make the judicial coextensive with the legislative authority appears from the definition which they gave to both. Upon the national legislature they proposed to confer, in addition to the rights vested in Congress by the Confederation, power to legislate in all cases to which the separate states were incompetent, or in which the harmony of the United States might be interrupted by the exercise of individual legislation ; and the further power to negative all laws passed by the several states contravening, in the opinion of the national legislature, the Articles of Union, or any treaties subsisting under the authority of the Union. The jurisdiction of the national judiciary, it was declared, should extend to all cases which respect the collection of the national revenue and to impeachments of national officers ; and then the comprehensive addition was made of "questions which involve the national peace and harmony." This latter provision placed the general objects which, it was declared, ought to be embraced by the legislative power, within the cognizance of the judiciary. Those objects were not yet described in detail, the purpose being merely to settle and declare the principles on which the powers of both departments ought to be founded.

But, as we have already had occasion to see, the idea of vesting in the judicial department such control over the legislation of the separate states as might be surrendered by them to the national government was not yet propounded. The principle which was to ascertain the extent of that control was already introduced and acted upon, namely, that it should embrace all laws of the states which might conflict with the Constitution or the treaties made under the national authority. The plan at present was, as we have seen, to treat this as a legislative power, to be executed by the direct control of a negative. But a nearer view of the great inconveniences of such an arrangement, and the general basis of the jurisdiction already marked out for the national judiciary, led to the development of the particular feature which was required as a substitute for direct interference with the legislative powers of the states. In truth, the important principle which proposed

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to extend the judicial authority to questions involving the national peace and harmony embraced all the power that was required; and it only remained to be seen that the exercise of that power by the indirect effect of judicial action on the laws of the states after they had been passed was far preferable to a direct interference with those laws while in the process of enactment.

The committee, with complete unanimity, determined that the judges of the supreme tribunal should hold their offices during good behavior.<sup>1</sup> This tenure of office was taken from the English statutes, and from the constitutions of some of the states which had already adopted it. The commissions of the judges in England, until the year 1700, were prescribed by the crown; and although they were sometimes issued to be held during good behavior, they were generally issued during the pleasure of the crown, and it was always optional with the crown to adopt the one or the other tenure, as it saw fit. But in the statute passed in the thirteenth year of the reign of William III., which finally secured the ascendancy of the Protestant religion in that country, and made other provisions for the rights and liberties of the subject, it was enacted that judges' commissions should be made during good behavior, and that their salaries should be ascertained and established; but it was made lawful for the crown to remove them upon the address of both houses of Parliament.<sup>2</sup> Still, however, it was always considered that the commissions of the judges expired on the death of the king; and for the purpose of preventing this, and in order to make the judges more effectually independent, a new statute, passed in the first year of the reign of George III., declared that the commissions of the judges should continue in force during their good behavior, notwithstanding the demise of the crown; and that such salaries as had been once granted to them should be paid in all future time, so long as their commissions should remain in force. The provision which made them removable by the crown on the address of both houses of Parliament was retained and re-enacted.<sup>3</sup>

In framing the Constitution of the United States, the objectionable feature of the English system was rejected, and its valuable

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<sup>2</sup> Act 12 and 13 William III., ch. 2.

<sup>3</sup> Act 1 Geo. III., ch. 23.

provisions were retained. No one, at the stage of the proceedings which we are now examining, proposed to make the judges removable on the address of the legislature; and although at a much later period this provision was brought forward, it received the vote of a single state only. The first determination of the Convention, in committee of the whole, was, that the judges should hold their offices during good behavior; that they should receive punctually, at stated times, a fixed compensation for their services, in which no *increase*<sup>1</sup> or diminution should be made so as to affect the persons actually in office at the time.

The appointment of the judges was by general consent, at this stage of the proceedings, vested in the Senate.

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<sup>1</sup> This was afterwards stricken out.

## CHAPTER XX.

ADMISSION OF NEW STATES.—GUARANTEE OF REPUBLICAN GOVERNMENT.—POWER OF AMENDMENT.—OATH TO SUPPORT THE NEW SYSTEM.—RATIFICATION.

HAVING settled a general plan for the organization of the three great departments of government, the committee next proceeded to provide for certain other objects of primary importance, the necessity for which had been demonstrated by the past history of the Confederacy. The first of these was the admission of new states into the Union.

It had long been apparent that the time would sooner or later arrive when the limits of the United States must be extended, and the number of the states increased. Circumstances had made it impossible that the benefits and privileges of the Union should be confined to the original thirteen communities by whom it had been established. Population had begun to press westward from the Atlantic States with the energy and enterprise that have marked the Anglo-American character since the first occupation of the country. Wherever the hardy pioneers of civilization penetrated into the wilderness of the Northwest, they settled upon lands embraced by those shadowy boundaries which carried the territorial claims of some of the older states into the region beyond the Ohio. Circumstances, already detailed in a former part of this work, had compelled a surrender of these territorial claims to the United States; and in the efforts made by Congress, both before and after the cessions had been completed, to provide for the establishment of new states and for their admission into the Union, we have already traced one of the great defects of the Confederation, which rendered it incapable of meeting the exigencies created by this inevitable expansion of the country.<sup>1</sup>

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<sup>1</sup> Ante, Chap. XIV.

In the year 1784, when Mr. Jefferson brought into Congress a measure for the organization and admission of new states, to be formed upon the territories that had been or might thereafter be ceded to the United States, he seems to have considered that the Articles of Confederation authorized the admission of new states formed out of territory that had belonged to a state already in the Union, by a vote of nine states in Congress. But a majority of the states in Congress evidently regarded the power of admission as doubtful; and although they passed the resolves for the admission of new states—principally because it was extremely important to invite cessions of western territory—they left the provision as to the mode of admission so indefinite that the whole question of power would have to be opened and decided on the first application that might be made by a state to be admitted into the Union.<sup>1</sup>

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<sup>1</sup> Mr. Jefferson has very lucidly stated the position of the question in some observations furnished by him, when in Paris, to one of the editors of the *Encyclopédie Méthodique*, in 1786 or 1787, which I here insert entire. "The eleventh Article of Confederation admits Canada to accede to the Confederation at its own will, but adds, 'no other colony shall be admitted to the same unless such admission be agreed to by nine states.' When the plan of April, 1784, for establishing new states, was on the carpet, the committee who framed the report of that plan had inserted this clause: 'Provided nine states agree to such admission, according to the reservation of the eleventh of the Articles of Confederation.' It was objected—1. That the words of the Confederation, 'no other colony,' could refer only to the residuary possessions of Great Britain, as the two Floridas, Nova Scotia, etc., not being already parts of the Union; that the law for 'admitting' a new member into the Union could not be applied to a territory which was already in the Union, as making part of a state which was a member of it. 2. That it would be improper to allow 'nine' states to receive a new member, because the same reasons which rendered that number proper now would render a greater one proper when the number composing the Union should be increased. They therefore struck out this paragraph, and inserted a proviso, that 'the consent of so many states in Congress shall be first obtained as may at the time be competent;' thus leaving the question whether the eleventh article applies to the admission of new states to be decided when that admission shall be asked. See the Journal of Congress of April 20th, 1784. Another doubt was started in this debate, viz., whether the agreement of the nine states required by the Confederation was to be made by their legislatures, or by their delegates in Congress? The expression adopted, viz., 'so many states in Congress is first obtained,' shows what was their sense of this matter. If it be agreed that the eleventh Article of the Confederation is not to be applied to the admission



When the Ordinance of 1787 was formed, it made provision for the establishment of new states in the territory, and declared that, when any of them should have sixty thousand free inhabitants, it should be admitted into Congress on an equal footing with the original states. But the mode of admission was not prescribed.

of these new states, then it is contended that their admission comes within the thirteenth article, which forbids 'any alteration unless agreed to in a Congress of the United States, and afterwards confirmed by the legislatures of every state.' The independence of the new states of Kentucky and Franklin will soon bring on the ultimate decision of all these questions." (Jefferson's Works, IX. 251). That the admission of a new state into the Union could have been regarded as an alteration of the Articles of Confederation, within the meaning and intention of the thirteenth article, seems scarcely probable. Such an admission would only have increased the number of the parties to the Union, but it would of itself have made no change in the Articles; and it was against alterations *in the Articles* that the provision of the thirteenth was directed. The objections which Mr. Jefferson informs us were raised in Congress to a deduction of the power from the eleventh article, appear to be decisive. In truth, when the Articles of Confederation were framed, the subject of the admission of new states, so far as it had been considered at all, was connected with the difficult and delicate controversy respecting the western boundaries of some of the old states, and the equitable claim of the Union to become the proprietor of the unoccupied lands beyond those boundaries. An attempt was made to obtain for Congress, in the Articles of Confederation, power to ascertain and fix the western boundaries of those states, and to lay out the lands beyond them into new states. But it failed (ante, p. 196), and Congress could thereafter be said to possess no power to admit new states, except what depended on a doubtful construction of the Articles of Confederation.

Still, both when they invited the cessions of their territorial claims by the states of Virginia, New York, etc., and after those cessions had been made, Congress acted as if they had constitutional authority to form new states, and to admit them into the Union. (Ante, pp. 196-207.) When the Ordinance of 1787, for the regulation and government of the Northwestern Territory, was adopted, the power to admit new states was again assumed. The Convention for forming the Constitution was, however, then sitting, and it may be that the framers of the ordinance introduced into that instrument the stipulation that the new states should be admitted on an equal footing with the old ones, in the confidence that the constitutional power would be supplied by the Convention. At any rate, the provisions of the ordinance, as well as those of the previous resolves of Congress on the same subject of the Northwestern Territory, and the position of Kentucky, Vermont, Maine, and Tennessee (then called Franklin), imposed upon the Convention an imperative necessity for some action that would open the door of the Union to new members.

The power to admit was assumed, and no rule of voting on the question of admission was referred to. The probability is, that Congress anticipated at this time that a definite constitutional power would be provided by the Convention that had been summoned to revise the federal system. This power was embraced in the plan adopted in the committee of the whole of that body, by a resolve which declared "that provision ought to be made for the admission of states lawfully arising within the limits of the United States, whether from a voluntary junction of government and territory, or otherwise, with the consent of a number of voices in the national legislature less than the whole." In what mode this provision was made will be seen hereafter, when we come to examine the framework of the Constitution.

Another of the new powers now proposed to be given to the Union was that of protecting and upholding the governments of the states. I have already had occasion to explain the relations of the Confederation to its members in a time of internal disturbance and peril; and have given to the incapacity of that government to afford any aid in such emergencies great prominence among the causes which led to the revision of the federal system.<sup>1</sup> Under that system the states had been so completely sovereign, and so independent of each other in all that related to their internal concerns, that the government of any one of them might have been subverted without the possibility of an authorized and regulated interference by the rest. The constitutional and republican liberty that had been established in these states after the Revolution had freed them from the dominion of England, was at that period a new and untried experiment; and in order that we of this generation may be able to appreciate the importance of the guarantee proposed to be introduced into the Constitution of the United States, it is necessary for us to look somewhat further than the particular circumstances of the commotions in New England that marked the year 1787 as an era of especial danger to these republican governments. It is, in fact, necessary for us to remember the contemporaneous history of Europe, and to observe how the events that were taking place in the Old World necessarily acted upon our condition, prospects, and welfare.

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<sup>1</sup> Ante, pp. 176-186. .

The French Revolution, consummated in 1791 by the execution of the king, was already begun when the Constitution of the United States went into operation. No one who has examined the history of the first years of our present national government can fail to have been impressed with the dangers which the administration of our domestic affairs incurred of becoming complicated with the politics of Europe. As in all other countries, so in America, the events and progress of the Revolution in France found sympathy or reprobation, according to the natural tendencies, the previous associations, and the political sentiments of individuals. But in the United States there was a peculiar and predisposing cause for the liveliest interest in the success of the principles that were believed, by large masses of the people, to be involved in the French Revolution. Our own struggles for liberty, our bold and successful assertion of the rights of man, and our achievement of the means and opportunity of self-government, had evidently and strikingly acted upon France. The people of the United States were fully sensible of this; and transferring to the French nation the debt of gratitude for the aid which had flowed to us in the first instance from their government without any special influence of their own, large numbers of our people became warmly enlisted in the cause of that Revolution of which the early promise seemed so encouraging to the best hopes of mankind, and the full development of which first ruined the interests of liberty, in the wanton excesses of anarchy and national ambition, and finally crushed them beneath the usurpations and necessities of military despotism. On the other hand, the more cautious—who, if they had not from the first looked with distrust upon the whole movement of the Revolutionary party in France, very soon believed that it could result in no real benefit to France or to the world—tended strongly and naturally to the side of those governments with which the leaders of the Revolution had to contend. In consequence of this state of feeling among different portions of the people of the United States, with reference to French affairs, and of the conduct of France and England towards ourselves, the administration of Washington had great difficulty both in preserving the neutrality of the country and in excluding foreign influence and interference in our domestic affairs.

Had this state of things, which followed immediately after the

inauguration of our new government, found us still under the Confederation, there can be no doubt that our condition would have afforded to the Revolutionary party in France the means, not only of disseminating their principles among us, but also of overturning any of the institutions of the weaker states which might have stood in the way of their acquiring an influence in America. Yet what form or principle of government is there in the world that more imperatively requires all foreign or external influence to be repelled than our own republican system, of which it is a cardinal doctrine that every institution and every law must express the uncontrolled and spontaneous will of a majority of the people who constitute the political society? Other governments may be upheld by the interference of their neighbors; other systems may require, and perhaps rightfully admit, foreign influence. Ours demand an absolute immunity from foreign control, and can exist only when the authority of the people is made absolutely free. That their authority should be made and kept free to act upon the principles that enable it to operate with certainty and safety, it requires the guarantee of a system that rests upon the same principles, is committed to the same destiny, is itself constituted by American power, and is created for the express purpose of preserving the republican form, the theory and the right of self-government.

Such was the purpose of the framers of the Constitution, when, in this early stage of their deliberations, they determined that a republican constitution should be guaranteed by the United States to each of the states.<sup>1</sup> The object of this provision was to secure to the people of each state the power of governing their own community, through the action of a majority, according to the fundamental rules which they might prescribe for ascertaining the public will. The insurrection in Massachusetts, then just suppressed, had made the dangers that surround this theory of gov-

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<sup>1</sup> As the resolution was originally passed, it declared that "a republican constitution, and its existing laws, ought to be guaranteed to each state by the United States." On account of the ambiguity of the expression "existing laws," and the controversies to which it might give rise, the provision was subsequently changed to a guarantee of "a republican form of government," and of protection against "invasion" and "domestic violence," as it now stands in Art. IV. Sect. 4 of the Constitution.

ernment painfully apparent. It had demonstrated the possibility that a minority might become in reality the ruling power. Fortunately no foreign interference had then intervened; but a very few years only elapsed before a crisis occurred in which the institutions of the states would have been quite unable to withstand the shocks proceeding from the French Revolution, if the government of the Union had not been armed with the power of protecting and upholding them.

The committee also added another new feature to their plan of government, which was a capacity of being amended. The Articles of Confederation admitted of changes only when they had been agreed upon in Congress, and had afterwards been confirmed by the legislatures of all the states. Indeed, it resulted necessarily from the nature of that government that it could only be altered by the consent of all the parties to it. It was now proposed and declared that provision ought to be made for the amendment of the Articles of Union, whenever it should seem necessary. This declaration looked to the establishment of some new method of originating improvements in the system of government, and a new rule for their adoption.

It was also determined that the members of the state governments should be bound by oath to support the Articles of Union. The purpose of this provision was to secure the supremacy of the national government, in cases of collision between its authority and the authority of the states. It was a new feature in the national system, and received at first the support of only a bare majority of the states.<sup>1</sup>

Finally, it was provided that the new system, after its approbation by Congress, should be submitted to representative assemblies recommended by the state legislatures, to be expressly chosen by the people to consider and decide thereon. The question has often been discussed, whether this mode of ratification marks in any way the character of the government established by the Constitution. At present it is only necessary to observe that the design of the committee was to substitute the authority of the

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<sup>1</sup> Massachusetts, Pennsylvania, Virginia, North Carolina, South Carolina, and Georgia voted for it (6); Connecticut, New Jersey, New York, Delaware, and Maryland voted against it (5).

people of the states in the place of that of the state legislatures, for a threefold purpose. First, it was deemed desirable to resort to the supreme authority of the people, in order to give the new system a higher sanction than could be given to it by the state governments. Secondly, it was thought expedient to get rid of the doctrine, often asserted under the Confederation, that the Union was a mere compact or treaty between independent states, and that therefore a breach of its articles by any one state absolved the rest from its obligations. In the third place, it was intended, by this mode of ratification, to enable the people of a less number of the states than the whole to form a new Union, if all should not be willing to adopt the new system.<sup>1</sup> The votes of the states in committee, upon this new mode of ratification, show that on one side were ranged the states that were aiming to change the principle of the government, and on the other the states that sought to preserve the principle of the Confederation.<sup>2</sup>

These, together with a provision that the authority of the old Congress should be continued to a given day after the changes should have been adopted, and that their engagements should be completed by the new government, were the great features of the system prepared by the committee of the whole, and reported to the Convention on the thirteenth of June.<sup>3</sup>

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<sup>1</sup> See Madison, Elliot, V. 157, 158, 183.

<sup>2</sup> Massachusetts, Pennsylvania, Virginia, North Carolina, South Carolina, Georgia, *ay*, 6; Connecticut, New York, New Jersey, *no*, 3; Delaware, Maryland, divided. See further on the subject of "Ratification," post, Index.

<sup>3</sup> The report was in the following words:

"1. *Resolved*, That it is the opinion of this committee that a national government ought to be established, consisting of a supreme legislative, executive, and judiciary.

"2. *Resolved*, That the national legislature ought to consist of two branches.

"3. *Resolved*, That the members of the first branch of the national legislature ought to be elected by the people of the several states for the term of three years; to receive fixed stipends by which they may be compensated for the devotion of their time to the public service, to be paid out of the national treasury; to be ineligible to any office established by a particular state, or under the authority of the United States (except those peculiarly belonging to the functions of the first branch), during the term of service, and under the national government, for the space of one year after its expiration.

"4. *Resolved*, That the members of the second branch of the national legis-

lature ought to be chosen by the individual legislatures; to be of the age of thirty years, at least; to hold their offices for a term sufficient to insure their independence, namely, seven years; to receive fixed stipends, by which they may be compensated for the devotion of their time to the public service, to be paid out of the national treasury; to be ineligible to any office established by a particular state, or under the authority of the United States (except those peculiarly belonging to the functions of the second branch), during the term of service, and under the national government, for the space of one year after its expiration.

"5. *Resolved*, That each branch ought to possess the right of originating acts.

"6. *Resolved*, That the national legislature ought to be empowered to enjoy the legislative rights vested in Congress by the Confederation; and, moreover, to legislate in all cases to which the separate states are incompetent, or in which the harmony of the United States may be interrupted by the exercise of individual legislation; to negative all laws passed by the several states contravening, in the opinion of the national legislature, the Articles of Union, or any treaties subsisting under the authority of the Union.

"7. *Resolved*, That the right of suffrage in the first branch of the national legislature ought not to be according to the rule established in the Articles of Confederation, but according to some equitable ratio of representation; namely, in proportion to the whole number of white and other free citizens and inhabitants, of every age, sex, and condition, including those bound to servitude for a term of years, and three fifths of all other persons not comprehended in the foregoing description, except Indians not paying taxes in each state.

"8. *Resolved*, That the right of suffrage in the second branch of the national legislature ought to be according to the rule established for the first.

"9. *Resolved*, That a national executive be instituted, to consist of a single person, to be chosen by the national legislature, for the term of seven years, with power to carry into execution the national laws, to appoint to offices in cases not otherwise provided for, to be ineligible a second time, and to be removable on impeachment and conviction of malpractice or neglect of duty; to receive a fixed stipend, by which he may be compensated for the devotion of his time to the public service, to be paid out of the national treasury.

"10. *Resolved*, That the national executive shall have a right to negative any legislative act, which shall not be afterwards passed unless by two thirds of each branch of the national legislature.

"11. *Resolved*, That a national judiciary be established, to consist of one supreme tribunal, the judges of which shall be appointed by the second branch of the national legislature, to hold their offices during good behavior, and to receive punctually, at stated times, a fixed compensation for their services, in which no increase or diminution shall be made so as to affect the persons actually in office at the time of such increase or diminution.

"12. *Resolved*, That the national legislature be empowered to appoint inferior tribunals.

"13. *Resolved*, That the jurisdiction of the national judiciary shall extend

to all cases which respect the collection of the national revenue, impeachments of any national officers, and questions which involve the national peace and harmony.

"14. *Resolved*, That provision ought to be made for the admission of states lawfully arising without the limits of the United States, whether from a voluntary junction of government and territory, or otherwise, with the consent of a number of voices in the national legislature less than the whole.

"15. *Resolved*, That provision ought to be made for the continuance of Congress, and their authorities and privileges, until a given day after the reform of the Articles of Union shall be adopted, and for the completion of all their engagements.

"16. *Resolved*, That a republican constitution, and its existing laws, ought to be guaranteed to each state by the United States.

"17. *Resolved*, That provision ought to be made for the amendment of the Articles of Union, whensoever it shall seem necessary.

"18. *Resolved*, That the legislative, executive, and judiciary powers within the several states ought to be bound by oath to support the Articles of Union.

"19. *Resolved*, That the amendments which shall be offered to the Confederation by the Convention ought, at a proper time or times after the approbation of Congress, to be submitted to an assembly or assemblies of representatives, recommended by the several legislatures, to be expressly chosen by the people to consider and decide thereon."



## CHAPTER XXI.

### ISSUE BETWEEN THE VIRGINIA AND THE NEW JERSEY PLANS. — HAMILTON'S PROPOSITIONS.—MADISON'S VIEW OF THE NEW JERSEY PLAN.

THE nature of the plan of government thus proposed—called generally in the proceedings of the Convention the Virginia plan—may be perceived from the descriptions that have now been given of the design and scope of its principal features, and of the circumstances out of which they arose. It purported to be a supreme and a national government; and we are now to inquire in what sense and to what extent it was so.

Its powers, as we have seen, were to be distributed among the three departments of a legislative, an executive, and a judiciary. Its legislative body was to consist of two branches, one of which was to be chosen directly by the people of the states, the other by the state legislatures; but in both the people of the states were to be represented in proportion to their numbers.

Its legislative powers were to embrace certain objects to which the legislative powers of the separate states might be incompetent, or where their exercise might be injurious to the national interests;<sup>1</sup> and it was moreover to have a certain restraining authority over the legislation of the states. This plan necessarily supposed that the residue of the sovereignty and legislative power of the states would remain in them after these objects had been provided for; and it therefore contemplated a system of government in which the individual citizen might be acted upon by two separate and distinct legislative authorities. But by providing that the legislative power of the national government should be derived from the people inhabiting the several states, and by creating an

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<sup>1</sup> The regulation of commerce was not, any more than other specific powers, otherwise provided for than by these general descriptions.

executive and a judiciary with an authority commensurate with that of the legislature, it sought to make, and did theoretically make, the national government, in its proper sphere, supreme over the governments of the states.

With respect to the element of stability, as depending on the length of the tenure of office, this system was far in advance of any of the republican governments then existing in America; for it contemplated that the members of one branch of the legislature should be elected for three, and those of the other branch, and the executive, for seven years.

If we compare it with the Confederation, which it was designed to supersede, we find greatly enlarged powers, somewhat vaguely defined; the addition of distinct and regular departments, accurately traced; and a totally different basis for the authority and origin of the government itself.

Such was the nature of the plan of government proposed by a majority of the states in convention, for the consideration of all. It had to encounter, in the first place, the want of an express authority in the convention to propose any change in the fundamental principle of the government. The long existence of the distinctions between the different states, the settled habit of the people of the states to act only in their separate capacities, their adherence to state interests, and their strong prejudices against all external power, had prevented them from contemplating a government founded on the principle of a national unity among the populations of their different communities. Hence it is not surprising that men, who came to the Convention without express powers which they could consider as authority for the introduction of so novel a principle, should have been unwilling to agree to the formation of a government that was to involve the surrender of a large portion of the sovereignty of each state. They felt a real apprehension lest their separate states should be lost in the comprehensive national power which seemed to be foreshadowed by the plans at which others were aiming. It seemed to them that the consequence, the power, and even the existence, of their separate political corporations, were about to be absorbed into the nation.

In the second place, the mode of reconciling the co-ordinate existence of a national and a state sovereignty had undergone no

public discussion. At the same time almost all the evils, the inconveniences, and the dangers which the country had encountered since the peace of 1783 had sprung from the impossibility of uniting the action of the states upon measures of general concern. For this reason there were men in the Convention who at one time doubted the utility of preserving the states, and who naturally considered that the only mode in which a durable and sufficient government could be established was to fuse all the elements of political power into a single mass. To those who had this feeling the Virginia plan was as little acceptable as it was, for the opposite reason, to others.

It was, however, from the party opposed to any departure from the principle of the Confederation that the first and the chief opposition came. The delegations of Connecticut, New York (with the exception of Hamilton), New Jersey, and Delaware, and one prominent member from Maryland — Luther Martin — preferred to add a few new powers to the existing system, rather than to substitute a national government. They were determined not to surrender the present equality of suffrage in Congress; and accordingly the members from the state of New Jersey brought forward a plan of a purely "federal" character.<sup>1</sup>

This plan proposed that the Articles of Confederation should be so revised and enlarged as to give to Congress certain additional powers, including a power to levy duties for purposes of revenue and the regulation of commerce. But it left the constitution of Congress as it was under the Confederation, and left also the old mode of discharging the national expenses by means of requisitions on the states, changing only the rule of proportion from the basis of real property to that of free population. It contemplated an executive, to be elected by Congress, and a supreme judiciary to be appointed by the executive; leaving to the judiciaries of the states original cognizance of all cases arising under the laws of the Union, and confining the national judiciary to an appellate jurisdiction, except in the cases of impeachments of national officers. It proposed to secure obedience to the acts and regulations of Congress by making them the supreme law of the

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<sup>1</sup> This, together with the Virginia plan, which was recommitted along with it, was referred to a second committee of the whole, June 15th.

states, and by authorizing the executive to employ the power of the confederated states against any state or body of men who might oppose or prevent their being carried into execution.

The mover of this system<sup>1</sup> founded his opposition to the plan framed by the committee of the whole chiefly upon the want of power in the Convention to propose a change in the principle of the existing government. He argued, with much acuteness, that there was either a present confederacy of the states, or there was not; that if there was, it was one founded on the equal sovereignties of the states, and that it could be changed only by the consent of all; that as some of the states would not consent to the change proposed, it was necessary to adhere to the system of representation by states; and that a system of representation of the people of the states was inconsistent with the preservation of the state sovereignties. The answer made to this objection was, that although the states, in appointing their delegates to the Convention, had given them no express authority to change the principle of the existing constitution, yet that the Convention had been assembled at a great crisis in the affairs of the Union, as an experiment, to remedy the evils under which the country had long suffered from the defects of its general government; that whatever was necessary to the safety of the republic must, under such circumstances, be considered as within the implied powers of the Convention, especially as it was proposed to do nothing more than to recommend the changes which might be found necessary; and that although all might not assent to the changes that would be proposed, the dissentient states could not require the others to remain under a system that had completely failed, when they could form a new confederacy upon wiser and better principles.<sup>2</sup>

It was at this point that Hamilton interposed, with the suggestion of views and opinions that have sometimes subjected him, unjustly, to the charge of anti-republican and monarchical tendencies and designs. These views and opinions should be carefully considered by the reader, not only in justice to this great statesman, but because they had much influence, in an indirect manner, in

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<sup>1</sup> William Patterson of New Jersey.

<sup>2</sup> See the remarks of Wilson, Pinckney, and Randolph, as given in Madison, Elliot, V. 195-198.

producing the form and tone which the Constitution finally received.

It should be recollected, in making this examination, that, so far as there was at this time a distinct issue before the Convention, it was presented by the New Jersey plan of a system that would leave the sovereignties of the states almost wholly undiminished, on the one hand, and on the other by the Virginia plan of a partial, but as yet undefined, surrender of powers to a general government. The construction of this proposed government, and the powers that it ought to possess, were the points which Hamilton now dealt with, in the first address which he made to the committee.

He has left it on record that the views which he announced on this occasion were rested upon the three following positions : 1. That the political principles of the people of this country would endure nothing but a republican government. 2. That, in the actual situation of the country, it was of itself right and proper that the republican theory should have a full and fair trial. 3. That to such a trial it was essential that the government should be so constructed as to give it all the energy and stability reconcilable with the principles of that republican theory.<sup>1</sup> The opinions advanced by Hamilton at the stage of the proceedings which we are now examining must always be considered with reference to the principles which guided him, in order that a right estimate may be formed of their influence on the final result of the issue then pending.

After disposing of the objection that the Convention had no power to propose a plan of government differing from the principle of the Confederation, he proceeded to say that there were three lines of conduct before them : first, to make a league offensive and defensive between the states, treaties of commerce, and an apportionment of the public debt ; secondly, to amend the present Confederation by adding such powers as the public mind seemed ready to grant ; thirdly, to form a new government, which should pervade the whole, with decisive powers and a complete sovereignty. The practicability of the last course, and the mode

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<sup>1</sup> See his letter of September 16th, 1803, addressed to Timothy Pickering ; first published in Niles's Register, November 7th, 1812.

in which the object should be accomplished, were the important and the only real questions before them. But the solution of those questions involved an inquiry into the principles of civil obedience, which are the great and essential supports of all government.

The first of these principles, he said, is an active and constant interest in the support of a government. This principle did not then exist in the states in favor of the general government. They constantly pursued their own particular interests, which were adverse to those of the whole. The second principle is a conviction of the utility and necessity of a government. As the general government might be dissolved and yet the order of society would continue—so that many of the purposes of government would still be attainable, to a considerable degree, within the states themselves—a conviction of the utility or the necessity of a general government could not at that time be considered as an active principle among the people of the states. The third principle is an habitual sense of obligation; and here the whole force of the tie was on the side of state government. Its sovereignty was immediately before the eyes of the people; its protection they immediately enjoyed; by its hand private justice was administered. In the existing state of things, the central government was known only by its unwelcome demands of money or service.

The fourth principle on which government must rely is force; by which he meant both the coercion of laws and the coercion of arms. But as to the general government, the coercion of laws did not exist; and to employ the force of arms on the states would amount to a war between the parties to the confederacy. The fifth principle was influence; by which he did not mean corruption, but a dispensation of those regular honors and just emoluments which produce an attachment to government. Almost the whole weight of these was then on the side of the states, and must remain so in any mere confederacy, rendering it in its very nature feeble and precarious.

The lessons afforded by experience led to the evident conclusion that all federal governments were weak and distracted. They were so because the strong principles which he had enumerated operated on the side of the constituent members of the confederacy, and against the central authority. In order, therefore, to

establish a general and national government, with any hope of its duration, they must avail themselves of these principles. They must interest the wants of men in its support; they must make it useful and necessary; and they must give it the means of coercion. For these purposes it would be necessary to make it completely sovereign.

The New Jersey plan certainly would not produce this effect. It merely granted the regulation of trade and a more effectual collection of the revenue, and some partial duties, which, at five or ten per cent., would perhaps only amount to a fund to discharge the debt of the corporation. But there were a variety of objects which must necessarily engage the attention of a national government. It would have to protect our rights against Canada on the north, against Spain on the south, and the western frontier against the savages. It would have to adopt necessary plans for the settlement of the frontiers, and to institute the mode in which settlements and good governments were to be made. According to the New Jersey plan, the expense of supporting and regulating these important matters could only be defrayed by requisitions. This mode had already proved, and would always be found, ineffectual. The national revenue must be drawn from commerce—from imposts, taxes on specific articles, and even from exports, which, notwithstanding the common opinion, he held to be fit objects of moderate taxation.

The radical objections to the New Jersey plan he held to be its equality of suffrage as between the states, its incapacity to raise forces or to levy taxes, and the organization of Congress, which it proposed to leave unchanged. On the other hand, the great extent of the country to be governed, and the difficulty of drawing a suitable representation from such distances, led him to regard the Virginia plan with doubt and hesitation. At the same time he declared that the system must be a representative and republican government. But representation alone, without the element of a permanent tenure of office in some part of the system, would not, as he believed, answer the purpose. For, as society naturally falls into the political divisions of the few and the many, or the majority and the minority, some part of every good representative government must be so constituted as to furnish a check to the mere democratic element. The Virginia plan, which

proposed that both branches of the national legislature should be chosen by the people of the states, and that the executive should be appointed by the legislature, presented a democratic Assembly to be checked by a democratic Senate, and both of them by a democratic chief magistrate. To give a Senate or an executive thus chosen an official term a few years longer than that of the members of the Assembly would not be sufficient to remove them from the violence and turbulence of the popular passions.

For these reasons they must go as far, in order to attain stability and permanency, as republican principles would admit. He would, therefore, have the Senate and the executive hold their offices during good behavior. Such a system would be strictly republican so long as these offices remained elective and the incumbents were subject to impeachment. The term *monarchy* could not apply to such a system, for it marks neither the degree nor the duration of power. And in order to obviate the danger of tumults attending the election of an executive who should hold his office during good behavior, he proposed that the election should be made by a body of electors, to be chosen by the people, or by the legislatures of the states. The Assembly he proposed to have chosen by the people of the states for three years. The legislative *powers* of the general government he desired to have extended to all subjects; at the same time he did not contemplate the total abolition of the state governments, but considered them essential, both as subordinate agents of the general government and as the administrators of private justice among their own citizens.<sup>1</sup>

His conclusions were, first, that it was impossible to secure the Union by any modification of a federal government; secondly, that a league, offensive and defensive, was full of certain evils and greater dangers; thirdly, that to establish a general government would be very difficult, if not impracticable, and liable to various objections. What, then, was to be done? He answered that they must balance the inconveniences and the dangers, and choose that system which seemed to have the fewest objections.

The plan which Hamilton then read to the Convention, the principal features of which have thus been stated, was designed to

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<sup>1</sup> See the note at the end of this chapter.



establish a general and national government, with any hope of its duration, they must avail themselves of these principles. They must interest the wants of men in its support; they must make it useful and necessary; and they must give it the means of coercion. For these purposes it would be necessary to make it completely sovereign.

The New Jersey plan certainly would not produce this effect. It merely granted the regulation of trade and a more effectual collection of the revenue, and some partial duties, which, at five or ten per cent., would perhaps only amount to a fund to discharge the debt of the corporation. But there were a variety of objects which must necessarily engage the attention of a national government. It would have to protect our rights against Canada on the north, against Spain on the south, and the western frontier against the savages. It would have to adopt necessary plans for the settlement of the frontiers, and to institute the mode in which settlements and good governments were to be made. According to the New Jersey plan, the expense of supporting and regulating these important matters could only be defrayed by requisitions. This mode had already proved, and would always be found, ineffectual. The national revenue must be drawn from commerce—from imposts, taxes on specific articles, and even from exports, which, notwithstanding the common opinion, he held to be fit objects of moderate taxation.

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<sup>1</sup> See the note at the end of this chapter.

explain his views, but was not intended to be offered as a substitute for either of the two others then under consideration. The issue accordingly remained unchanged; and that issue lay between the Virginia and the New Jersey plans, or between a system of equal representation by states and a system of proportionate representation of the people of the states. Besides this radical difference, the Virginia plan contemplated two houses, while the New Jersey plan proposed to retain the existing system of a single body.

But in order that a sound judgment may be formed of the correctness of Hamilton's opinions, and of the useful influence which they exerted, it must be remembered that there was an inconsistency in the Virginia plan which he was then aiming to exhibit. That plan was a purely national system; it drew both branches of the national legislature from the people of the states in proportion to their numbers, and merely interposed the legislatures of the states as the electors of so many senators as the state might be entitled to have according to the ratio of representation. Its inconsistency lay in the fact that, while it would have created a government in which the proportionate principle of representation would have obtained in both houses, making a purely national government, in which the states, as equal political corporations, could have exercised no direct control over its legislation, it left the separate political sovereignties of the states almost wholly unimpaired, taking from them jurisdiction over such subjects only as seemed to require national legislation. The operation of such a system must necessarily have involved perpetual conflicts between national and state power; for the states, possessed of a large part of their original sovereignties, and yet unable to exert an equal control in either branch of Congress, would have been constantly tempted and obliged to exert the indirect power of their separate legislation against the direct and democratic force of a majority of the people of the United States. To such a system the objection urged by Hamilton, that it presented a democratic House checked by a democratic Senate, was strikingly applicable. This objection, it is true, was not presented by him as a reason for admitting the states to a direct and equal representation in the government; he employed it to enforce the expediency of giving to the Senate a different basis from that of the House,

and one further removed from popular influences. But when, at a subsequent period, the first great compromise of the Constitution—that between a purely national and a purely federal system—took place by the admission of the states to an equal representation in the Senate, the force of Hamilton's reasoning was felt, and the necessity for a check as between the two houses, founded on a difference of origin, which he had so strenuously maintained, both facilitated and hastened the concession to the demands of the smaller states.

At present Hamilton's object, in the discussions which we are now considering, was to show that, if the government was to be purely national—as was the theory of the Virginia plan, and as he undoubtedly preferred—it must be consistent with that theory and with the situation in which its adoption would leave the country. It must introduce through the Senate a real check upon the democratic power that would act through the House, by a different mode of election and a permanent tenure of office; and in order that the states might not be in a situation to resist the measures of a government designed to be national and supreme, that government must possess complete and universal legislative power.

Surely it can be no impeachment of the wisdom or the statesmanship of this great man that, at a time when a large majority of the Convention were seeking to establish a purely national system, founded on a proportionate representation of the people of the states, he should have pointed out the inconsistencies of such a plan, and should have endeavored to bring it into a nearer conformity with the theory which so many of the members and so many of the states had determined to adopt. It seems rather to be a proof of the deep sagacity which had always marked his opinions and his conduct that he should have foreseen the inevitable collisions between the powers of a national government thus constituted and the powers of the states. The whole experience of the past had taught him to anticipate such conflicts, and the theory of a purely national government, when applied by the arrangement now proposed, rendered it certain that these conflicts must continue and increase. That theory could only be put in practice by transferring the whole legislative powers of the people of the states to the national government. This he would have

preferred; and in this, looking from the point of view at which he then stood, and considering the actual position of the subject, he was undoubtedly right.<sup>1</sup>

For it is not to be forgotten that, after the votes which had been taken, and after the position assumed by the states opposed to anything but a federal plan, the choice seemed to lie between a purely national and a purely federal system; that the indications then were that the Virginia plan would be adopted; and that we owe the present compound character of the Constitution, as a government partly national and partly federal, not to the mere theories proposed on either side, but to the fortunate results of a wise compromise, made necessary by the collision between the opposite purposes and desires of different classes of the states.

At the time when Hamilton laid his views before the Convention there were two parties in that body, which were coming gradually to a struggle, not yet openly avowed, between the larger and the smaller states, on the fundamental principle of the government. The principal question at stake was whether there should be any national popular representation at all. While the Virginia plan carried a popular representation into both branches of the legislature, the New Jersey plan excluded it, and confined the system to a representation of states in a single body. The larger and more populous states adhered to the former of these two systems, because it involved the only principle upon which they believed they could form a new union, or enter into new relations with the smaller members of the Confederacy; while, on the other hand, the smaller members felt that self-preservation was for them involved in adhering to the old principle of the Confederation. Notwithstanding the defects and imperfections of the Virginia plan, it was deemed necessary by the majority of the Convention to insist upon it, until the principle of popular representation should be conceded by all as proper to exist in some part of the government; for an admission that it was theoretically incorrect in its application to either branch of the proposed legislature would have applied equally to the other branch; and the admission that would have been involved in the acceptance of Hamilton's propositions, namely, that in a purely national system

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<sup>1</sup> See the note at the end of this chapter.

there must be a Senate permanently in office, and that the legislative powers of the states must be mainly surrendered, would have tended only to confirm the opposition and to swell the numbers of the minority. The contest went on, therefore, as it had begun, between the opposite principles of popular and state representation, until it resulted in an absolute difference, requiring mutual concessions, or an abandonment of the effort to form a constitution.

On the day following that on which Hamilton had addressed the committee, Mr. Madison entered into an elaborate examination of the plan proposed by the minority. The previous congressional experience of this distinguished and sagacious man had well qualified him to detect the imperfections of a system calculated to perpetuate the evils under which the country had long suffered. His object now was to show that a union founded on the principle of the Confederation, and containing no diminution of the existing powers of the states, could not accomplish even the principal objects of a general government. It would not, he observed, in the first place, prevent the states from violating, as they had all along violated, the obligations of treaties with foreign powers; for it left them as uncontrolled as they had always been. It would not restrain the states from encroaching on the federal authority, or prevent breaches of the federal articles. It would not secure that equality of privileges between the citizens of different states, and that impartial administration of justice the want of which had threatened both the harmony and the peace of the Union. It would not secure the republican theory, which vested the right and the power of government in the majority, as the case of Massachusetts then demonstrated. It would not secure the Union against the influence of foreign powers over its members. Whatever might have been the case with ours, all former confederacies had exhibited the effects of intrigues practised upon them by other nations; and as the New Jersey plan gave to the general councils no negative on the will of the particular states, it left us exposed to the same pernicious machinations.

He begged the smaller states, which had brought forward this plan, to consider in what position its adoption would leave them. They would be subject to the whole burden of maintaining their delegates in Congress. They, and they alone, would feel the power of coercion on which the efficacy of this plan depended, for the

larger states would be too powerful for its exercise. On the other hand, if the obstinate adherence of the smaller states to an inadmissible system should prevent the adoption of any, the Union must be dissolved, and the states must remain individually independent and sovereign, or two or more new confederacies must be formed. In the first event, would the small states be more secure against the ambition and power of their larger neighbors than they would be under a general government pervading with equal energy every part of the empire, and having an equal interest in protecting every part against every other part? In the second event, could the smaller states expect that their larger neighbors would unite with them on the principle of the present Confederacy, or that they would exact less severe concessions than were proposed in the Virginia scheme?

The great difficulty, he continued, lay in the affair of representation; and if that could be adjusted all others would be surmountable. It was admitted by both of the gentlemen from New Jersey<sup>1</sup> that it would not be just to allow Virginia, which was sixteen times as large as Delaware, an equal vote only. Their language was, that it would not be safe for Delaware to allow Virginia sixteen times as many votes. Their expedient was, that all the states should be thrown into one mass, and a new partition be made into thirteen equal parts. Would such a scheme be practicable? The dissimilarities in the rules of property, as well as in the manners, habits, and prejudices of the different states, amounted to a prohibition of the attempt. It had been impossible for the power of one of the most absolute princes in Europe,<sup>2</sup> directed by the wisdom of one of the most enlightened and patriotic ministers that any age had produced,<sup>3</sup> to equalize in some points only the different usages and regulations of the different provinces. But, admitting a general amalgamation and repartition of the states to be practicable, and the danger apprehended by the smaller states from a proportional representation to be real, would not their special and voluntary coalition with their neighbors be less inconvenient to the whole community and equally effectual for their own safety?<sup>4</sup> If New Jersey or Delaware conceived that

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<sup>1</sup> Mr. Brearly and Mr. Patterson.

<sup>2</sup> Louis XVI.

<sup>3</sup> Necker.

<sup>4</sup> Mr. Patterson had said that, if they were to depart from the principle of

an advantage would accrue to them from an equalization of the states, in which case they would necessarily form a junction with their neighbors, why might not this end be attained by leaving them at liberty to form such a junction whenever they pleased? And why should they wish to obtrude a like arrangement on all the states, when it was, to say the least, extremely difficult, and would be obnoxious to many of the states, and when neither the inconvenience nor the benefit of the expedient to themselves would be lessened by confining it to themselves? The prospect of many new states to the westward was another consideration of importance. If they should come into the Union at all, they would come when they contained but few inhabitants. If they should be entitled to vote according to their proportion of inhabitants, all would be right and safe. Let them have an equal vote, and a more objectionable minority than ever might give law to the whole.<sup>1</sup>

At the close of Mr. Madison's remarks the committee decided, by a vote of seven states against three, one state being divided, to report the Virginia plan to the Convention. The delegation of New York (with the exception of Hamilton) and those of New Jersey and Delaware constituted the negative votes. The vote of Maryland was divided by Luther Martin, who had constantly acted with the minority. The vote of Connecticut was given for the report, but she was not long to remain on that side of the question.<sup>2</sup>

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equal sovereignty, the only expedient that would cure the difficulty would be to throw the states into hotchpot. To say that this was impracticable would not make it so. Let it be tried, and they would see whether Massachusetts, Pennsylvania, and Virginia would accede to it.—Madison, Elliot, V. 194.

<sup>1</sup> Elliot, V. 206-211.

<sup>2</sup> Madison, Elliot, V. 212. Journal, Elliot, I. 180. This vote was taken, and the committee of the whole were discharged, on the 19th of June.

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#### NOTE ON THE OPINIONS OF HAMILTON.

The idea has been more or less entertained, from the time of the Convention to the present day, that Hamilton desired the establishment of a *monarchical* government. This impression has arisen partly from the theoretical opinions on government which he undoubtedly held, and which he expressed with entire freedom in the course of the debate, of which an account has been



given in the previous chapter; and partly from the nature of some of his propositions, especially that for an executive during good behavior, which has been sometimes assumed to have been the same thing as an executive for life. I believe that the imputation of a purpose on his part to bring about the establishment of any system not essentially republican in its spirit and forms is unfounded and unjust, and that it can be shown to be so.

Mr. Luther Martin, in his celebrated letter or report to the legislature of Maryland on the doings of the Federal Convention, referred to a distinct monarchical party in that body, "whose object and wish," he said, "it was to abolish and annihilate all state governments, and to bring forward one general government over this whole continent, of a monarchical nature, under certain restrictions and limitations. Those who openly avowed this sentiment," he said, "were, it is true, but few; yet it is equally true that there was a considerable number who did not openly avow it, who were, by myself and many others of the Convention, considered as being in reality favorers of that sentiment and acting upon those principles, covertly endeavoring to carry into effect what they well knew openly and avowedly could not be accomplished." He then goes on to say that there was a second party, who were "not for the abolition of the state governments, nor for the introduction of a monarchical government under any form; but they wished to establish such a system as could give their own states undue power and influence, in the government, over the other states." "A third party," he adds, "was what I considered *truly federal and republican*," that is to say, it consisted of the delegations from Connecticut, New York, New Jersey, Delaware, and in part from Maryland, and of some members from other states, who were in favor of a federal equality and the old principle of the Confederation.

Upon this rule of classification the test of republicanism was to be found in the views entertained by members upon the question whether the state governments ought to be abolished. Mr. Martin, indeed, went further, and considered those only as *truly* republican who were in favor of a purely federal system, and opposed to any plan of popular representation. Now it is quite clear that the abolition of the state governments, so far as that subject was considered at all, and in the sense in which it was at any time mentioned, did not necessarily lead to *monarchy* as a conclusion. The reduction of the state governments to local corporations and to the position of subordinate agents of the central government, was considered by some as a necessary consequence of a national representative government. This arose from the circumstance that a union of federal and national representation had nowhere been witnessed, and had not therefore been considered. I have already suggested, in the text, that if the framers of the Constitution had gone on to the adoption of a pure system of popular and proportional representation in all the branches of the government, they must inevitably have bestowed upon that government full legislative power over all subjects; otherwise they would have left the states, possessed of the sovereign powers of a distinct political organization, to contend with the national government by adverse legislation. The subsequent expedient of a direct

and equal representation of the states in one branch of the government has in reality, to a great degree, disarmed state jealousy and opposition, by giving to the states as political bodies an equal voice in the check established by the branch in which they are represented.

So that to argue that, because there were men who saw the necessity for making a purely national or proportionate system of popular representation consistent with the situation in which it would place the country they were therefore in favor of a monarchical system, was to argue from premises to a conclusion in no way connected. Had such a plan been carried out it could have been, and must have been, purely republican in all its details; and it would have been liable to the reproach of being *monarchical* in no other sense than any system which did not yield the point of a full federal equality, for which Mr. Martin and his party contended.

Undoubtedly Hamilton, as I have said, was in favor of bestowing upon the national government full *power* to legislate upon all subjects; and to this extent, and in this sense, he proposed the abolition of the state governments. But any one who will attend carefully to the course of his argument—imperfectly as it has been preserved—will find that it embraces the following course of reasoning. All federal governments are weak and distracted. In order to avoid the evils incident to that form, the government of the American Union must be a national representative system. But no such system can be successful, in the actual situation of this country, unless it is endowed with all the principles and means of influence and power which are the proper supports of government. It must therefore be made completely sovereign, and state power, as a separate legislative authority, must be annihilated; otherwise the states will be not only able, but will be constantly tempted, to exert their own authority against the authority of the nation. I have already expressed the opinion that, in this view of the subject, assuming that the states were not to be admitted to an equal representation as political corporations in any branch of the government—as the framers and friends of the Virginia plan had thus far contended—Hamilton was right. I believe that a constitution in which the states had not been placed upon an equal footing in one branch of the legislative power, and under which the state sovereignties had been left as they were left by the system actually adopted, if it could have been ratified by all the states, could not have endured to our times. Yet the fortunate result of the mixed system that is embraced in the Constitution of the United States is the product, not simply of either of the theories of a national or a federal government, but of a compromise between the two.

But the charge of anti-republican tendencies or designs has been most often urged against Hamilton on account of his theoretical opinions concerning the comparative merits of different governments, and of certain features of the plan of a constitution which he read to the Convention. With respect to these points I shall state the results of a very careful examination which I have made of all the sources of information as to the views and opinions which he expressed or entertained. Mr. Madison has given us what he probably intended

as a full report of at least the substance of Hamilton's great speech addressed to the committee of the whole, and has informed us that his report was submitted to Colonel Hamilton, who approved it, with a few verbal changes. But how meagre a report, which fills but six pages in the octavo edition of Mr. Madison's "Debates," must have been in comparison with the speech actually made by Hamilton, will occur to every reader who notices the fact that the speech occupied the entire session of one day (June 18), and who examines the brief from which he spoke, and which is still extant. (Hamilton's Works, II. 409.)

He was an earnest, and I am inclined to think a fervid and rapid speaker. Certainly he spoke from a mind full of knowledge of the principles and the working of other systems of polity, and possessed of resources which have never been excelled in any statesman who has been called to aid in the work of creating a government. The topics set down in his brief exhibit a very wide range of thought, enriched by copious illustrations from the history and experience of other countries, and from the views of the most important writers on government; while the whole argument bears logically and closely upon the actual situation of our Confederacy and upon the questions at issue. It is not probable, therefore, that Mr. Madison's report gives us an adequate idea of the speech, or fully exhibits its reasoning. I have collated it, sentence by sentence, with the report in Judge Yates's Minutes, and with Hamilton's own brief, and have prepared for my own use a draft containing the substance of what these three sources can give us. The results may be thus given:

1. That Hamilton, in stating his views of the theoretical value of different systems of government, frankly expressed the opinion that the British Constitution was the best form which the world had then produced—citing the praise bestowed upon it by Necker, that it is the only government "which unites public strength with individual security."

2. That, with equal clearness, he stated it as his opinion that none but a republican form could be attempted in this country, or would be adapted to our situation.

3. That he proposed to look to the British Constitution for nothing but those elements of stability and permanency which a republican system requires, and which may be incorporated into it without changing its characteristic principles.

The only question that remains, in order to form a judgment of his purposes, is, whether there was anything in the plan of a constitution drawn up by him that is inconsistent with the spirit of republican liberty. The answer is, that there was not. There is throughout this plan a constant recognition of the authority of the people, as the source of all political power. It proposed that the members of the Assembly should be elected by the people directly, and the members of the Senate by electors chosen for the purpose by the people. The executive was in like manner to be chosen by electors, appointed by the people or by the state legislatures. So far, therefore, his plan was as strictly republican as is that of the Constitution under which we are actually living. But he proposed that the executive and the senators should hold their offices

*during good behavior*; and this has been his offence against republicanism, with those who measure the character of a system by the frequency with which it admits of rotation in office. His accusers have failed to notice that he made his executive personally responsible for official misconduct, and provided that both he and the senators should be subject to impeachment and to removal from office. This was a wide departure from the principles of the English Constitution, and it constitutes a most important distinction between a republican and a monarchical system, when it is accompanied by the fact that the office of a ruler or legislator is attained, not by hereditary right, or the favor of the crown, but by the favor and choice of the people.

I have thus stated the principal points to which the inquiries of the reader should be directed in investigating the opinions of this great man, because I believe it to be unjust to impute to him any other than a sincere desire for the establishment and success of republican government. That he desired a strong government, that he was little disposed to dogmatize upon abstract theories of liberty, and that he trusted more to experience than to hypothesis, may be safely assumed. But that he ardently desired the success of that republican freedom which is founded on a perfect equality of rights among citizens, exclusive of hereditary distinctions, is as certain as that he labored earnestly throughout his life for the maxims, the doctrines, and the systems which he believed most likely to secure for it a fair trial and ultimate success. (See his description of his own opinions, when writing of himself as a third person in 1792; Works, VII. 52.)

That the system of government sketched by Hamilton was not received by many of those who listened to him with disapprobation on account of what has since been supposed its *monarchical* character we may safely assume, on the testimony of Dr. Johnson, of Connecticut, one of the most moderate men in the Convention. Contrasting the New Jersey and Virginia plans, he is reported (by Yates) to have said: "It appears to me that the Jersey plan has for its principal object the preservation of the state governments. So far it is a departure from the plan of Virginia, which, although it concentrates in a distinct national government, is not totally independent of that of the states. A gentleman from New York, with boldness and decision, proposed a system totally different from both; and although he has been praised by everybody, he has been supported by none." (Yates's Minutes, Elliot, I. 431.)

Even Luther Martin did not seem to regard the objects of what he called the monarchical party as being any worse, or more dangerous to liberty, than the projects of those whom he represented as aiming to obtain undue power and influence for their own states, and whom at the same time he acquitted of monarchical designs or a desire to abolish the state governments. The truth is that nobody had any improper purposes, or anything at heart but the liberties and happiness of the people of America. We are not to try the speculative views of men engaged in such discussions as these by the charges or complaints elicited in the heats of conflicting opinions and interests, inflamed by a zeal too warm to admit the possibility of its own error, or to perceive the wisdom and purity of an opponent.

## CHAPTER XXII.

CONFLICT BETWEEN THE NATIONAL AND FEDERAL SYSTEMS.—DIVISION OF THE LEGISLATURE INTO TWO CHAMBERS.—DISAGREEMENT OF THE STATES ON THE REPRESENTATION IN THE TWO BRANCHES.—THREATENED DISSOLUTION OF THE UNION.

WE are now approaching a crisis in the action of the Convention, the history of which is full of instruction for all succeeding generations of the American people. We have witnessed the formation of a minority of the states, whose bond of connection was a common opposition to the establishment of what was regarded as a "national" government. The structure of this minority, as well as that of the majority to which they were opposed, the motives and purposes by which both were animated, and the results to which their conflicts finally led, are extremely important to be understood by the reader.

The relative rank of the different states in point of population at the time of the formation of the Constitution was materially different from what it is at the present day. Virginia, then the first state in the Union, is now the fourteenth. New York, now at the head of the scale, then ranked after North Carolina and Massachusetts, which occupied the third and fourth positions in the first census, and which now occupy respectively the fifteenth and seventh. South Carolina is now the twentieth state, and Maryland is the twenty-third. The population of Georgia is still larger than that of New Jersey, as it was in 1787.

Great inequalities existed, as they still exist, between the different members of the Confederacy, not only in the actual numbers of their inhabitants and their present wealth, but in their capacity and opportunity of growth. Virginia, with a population fourteen times as large, had a territorial extent of thirty times the size of Delaware. Pennsylvania had nearly seven times as many people as Rhode Island, and nearly forty times as much territory.

The state of Georgia numbered a little more than a third as many people, but her territory was nearly twelve times as large as the territory of Connecticut.

The four leading states, Virginia, Pennsylvania, North Carolina, and Massachusetts, had an obvious motive for seeking the establishment of a government founded on a proportionate representation of their respective populations. The states of South Carolina and Georgia had generally acted with them in the formation of the Virginia plan, and these six states thus constituted the majority by which the principle of what was called a "national," in distinction from a "federal" government, had been steadily pressed to the conclusions arrived at in the committee of the whole, and now embraced in its report.<sup>1</sup> All but two of them were certain to remain slaveholding states; but in the adoption of numbers as the basis of representative influence in the government they all had a common interest, which led them for the present to act together.<sup>2</sup>

At the head of the minority, or the states which desired a government of federal equality, stood the state of New York, then the fifth state in the Union. She was represented by Alexander Hamilton, Robert Yates, and John Lansing, Junior. The two latter uniformly acted together, and of course controlled the vote of the state. Hamilton's vote being thus neutralized, his influence on the action of the Convention extended no further than the weight and importance attached to his arguments by those who listened to them.

Occupying at that period nearly a middle rank between the largest and the smallest of the states with respect to population, New York had not yet grasped, or even perceived, the wonderful elements of her future greatness. Her commerce was not inconsiderable, but it had hitherto been the disposition of those who ruled her counsels to retain its regulation in their own hands, and to subject it to no imposts in favor of the general interests of the Union. Most of her public men,<sup>3</sup> also, held it to be impracti-

<sup>1</sup> Rhode Island was never represented in the Convention, and the delegation of New Hampshire had not yet attended.

<sup>2</sup> In all these statements of the relative rank of the states I compare the census of 1790 and that of 1850.

<sup>3</sup> The two great exceptions, of course, were Hamilton and Jay.

## CHAPTER XXII.

CONFLICT BETWEEN THE NATIONAL AND FEDERAL SYSTEMS.—DIVISION OF THE LEGISLATURE INTO TWO CHAMBERS.—DISAGREEMENT OF THE STATES ON THE REPRESENTATION IN THE TWO BRANCHES.—THREATENED DISSOLUTION OF THE UNION.

WE are now approaching a crisis in the action of the Convention, the history of which is full of instruction for all succeeding generations of the American people. We have witnessed the formation of a minority of the states, whose bond of connection was a common opposition to the establishment of what was regarded as a "national" government. The structure of this minority, as well as that of the majority to which they were opposed, the motives and purposes by which both were animated, and the results to which their conflicts finally led, are extremely important to be understood by the reader.

The relative rank of the different states in point of population at the time of the formation of the Constitution was materially different from what it is at the present day. Virginia, then the first state in the Union, is now the fourteenth. New York, now at the head of the scale, then ranked after North Carolina and Massachusetts, which occupied the third and fourth positions in the first census, and which now occupy respectively the fifteenth and seventh. South Carolina is now the twentieth state, and Maryland is the twenty-third. The population of Georgia is still larger than that of New Jersey, as it was in 1787.

Great inequalities existed, as they still exist, between the different members of the Confederacy, not only in the actual numbers of their inhabitants and their present wealth, but in their capacity and opportunity of growth. Virginia, with a population fourteen times as large, had a territorial extent of thirty times the size of Delaware. Pennsylvania had nearly seven times as many people as Rhode Island, and nearly forty times as much territory.

The state of Georgia numbered a little more than a third as many people, but her territory was nearly twelve times as large as the territory of Connecticut.

The four leading states, Virginia, Pennsylvania, North Carolina, and Massachusetts, had an obvious motive for seeking the establishment of a government founded on a proportionate representation of their respective populations. The states of South Carolina and Georgia had generally acted with them in the formation of the Virginia plan, and these six states thus constituted the majority by which the principle of what was called a "national," in distinction from a "federal" government, had been steadily pressed to the conclusions arrived at in the committee of the whole, and now embraced in its report.<sup>1</sup> All but two of them were certain to remain slaveholding states; but in the adoption of numbers as the basis of representative influence in the government they all had a common interest, which led them for the present to act together.<sup>2</sup>

At the head of the minority, or the states which desired a government of federal equality, stood the state of New York, then the fifth state in the Union. She was represented by Alexander Hamilton, Robert Yates, and John Lansing, Junior. The two latter uniformly acted together, and of course controlled the vote of the state. Hamilton's vote being thus neutralized, his influence on the action of the Convention extended no further than the weight and importance attached to his arguments by those who listened to them.

Occupying at that period nearly a middle rank between the largest and the smallest of the states with respect to population, New York had not yet grasped, or even perceived, the wonderful elements of her future greatness. Her commerce was not inconsiderable, but it had hitherto been the disposition of those who ruled her counsels to retain its regulation in their own hands, and to subject it to no imposts in favor of the general interests of the Union. Most of her public men,<sup>3</sup> also, held it to be impracti-

<sup>1</sup> Rhode Island was never represented in the Convention, and the delegation of New Hampshire had not yet attended.

<sup>2</sup> In all these statements of the relative rank of the states I compare the census of 1790 and that of 1850.

<sup>3</sup> The two great exceptions, of course, were Hamilton and Jay.



cable to establish a general government of sufficient energy to pervade every part of the United States, and to carry its appropriate benefits equally to all, without sacrificing the constitutional rights of the states to an extent that would ultimately prove to be dangerous to the liberties of their people. Their view of the subject was, that the uncontrolled powers and sovereignties of the states must be reserved; and that, consistently with the reservation of these, a mode might be devised of granting to the Confederacy the moneys arising from a general system of revenue, some power of regulating commerce and enforcing the observance of treaties, and other necessary matters of less moment. This was the opinion of Yates, the chief-justice of the state, who may be taken as a fair representative of the sentiments of a large part, if not of a majority, of its people at this time.<sup>1</sup> But neither he, nor any of those who concurred with him, succeeded in pointing out the mode in which the power to collect revenues, to regulate commerce, and to enforce the observance of treaties could be conferred on the Confederacy without impairing the sovereignties of the states. It does not appear whether this class of statesmen contemplated a grant of full and unrestrained power over these subjects to a federal government, or whether they designed only a qualified grant, capable of being recalled or controlled by the parties to the Confederacy, for reasons and upon occasions of which those parties were to judge. From the general course of their reasoning on the nature of a federal government, it might seem that the latter was their intention.<sup>2</sup> It is not difficult to understand how these gentlemen may have supposed that an irrevocable grant of powers to a general government might be dangerous to the liberties of the people of the states, because such a grant

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<sup>1</sup> See the candid and moderate letter of Messrs. Yates and Lansing to the legislature of the state, giving their reasons for not signing the Constitution. Elliot, I. 480.

<sup>2</sup> In the New Jersey plan, which the New York gentlemen (Hamilton excepted) supported, although the power to levy duties and the regulation of commerce were to be added to the existing powers of the old Congress, yet as these powers were to be exerted against the states, in the last resort, by force, it would only have been necessary for a state to place itself in an attitude of resistance by a public act, and then the grant of power might have been considered to be revoked by the very act of resisting its execution.

would involve a surrender of more or less of the original state sovereignties to a legislative body external to the state itself. But if they supposed that a grant of such powers could be made to a "federal" government, or a political league of the states, acting through a single body in the nature of a diet, and to be exercised when necessary by the combined military power of the whole, and yet be any less dangerous to liberty, it is difficult to appreciate their fears or to perceive the consistency of their plan. If the liberties of the people were any the less exposed under their system than under that of a "national" government, it must have been because their system was understood by them to involve only a qualified and revocable surrender of state sovereignty.

But however this may have been, there was undoubtedly a settled conviction on the part of the two delegates of New York who controlled the vote of the state in the Convention that they had not received the necessary authority from their own state to go beyond the principle of the Confederation; that it would be impracticable to establish a general government without impairing the state constitutions and endangering the liberties of the people; and that what they regarded as a "consolidated" government was not in the remotest degree within the contemplation of the legislature of New York when they were sent to take their seats in the Convention.

The same sentiments, with far greater zeal, with intense feeling and some acrimony, were held and acted upon by Luther Martin of Maryland, a very eminent lawyer, and at that time attorney-general of the state, who sometimes had it in his power, from the absence of his colleagues, to cast the vote of his state with the minority, and who generally divided it on all critical questions that touched the nature of the government. The state itself, with a population but a little less than that of New York, had no great reason to regard itself as peculiarly exposed to the dangers to be apprehended from combinations among the larger states to oppress the smaller; and it does not appear that these apprehensions were strongly felt by any of her representatives excepting Mr. Martin.<sup>1</sup>

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<sup>1</sup> Three of the delegates of the state, James McHenry, Daniel of St. Thomas Jenifer, and Daniel Carroll, signed the Constitution.

The great energy and earnestness, however, of that distinguished person prevented a concurrence of the state with the purposes and objects of the majority.

Connecticut might reasonably consider herself as one of the smaller states, and her vote was steadily given for an equality of suffrage in both branches of the national legislature, down to the time of the final division upon the Senate. The states of New Jersey and Delaware formed the other members of the minority upon this general question.

On the one side, therefore, of what would have been, but for the great inequalities among the states, almost a purely speculative question, we find a strong determination, the result of an apparent necessity, to establish a government in which the democratic majority of the whole people of the United States should be the ruling power; and in which, so far as state influence was to be felt at all, it should be felt only in proportion to the relative numbers of the people composing each separate community. It was considered by those who embraced this side of the question that, when the great states were asked to perpetuate the system of federal equality on which the Confederation had been founded, they were asked to submit to mere injustice, on account of an imaginary danger to their smaller confederates. They held it to be manifestly wrong that a state fourteen times as large as Delaware should have only the same number of votes in the national legislature. Whether the states were now met as parties to a subsisting confederacy, under which they might be regarded in the same light as the individuals composing the social compact, or whether they were to be looked upon as so many aggregates of individuals for whose personal rights and interests provision was to be made, as if they composed a nation already united, it was believed by the majority that no safe and durable government could be formed if the democratic element were to be excluded. Pure democracies had undoubtedly been attended with inconveniences. But how could peace and real freedom be preserved, under the republican form, if half a million of people dwelling in one political division of the country possessed only the same suffrage in the enactment of laws as sixty thousand people dwelling in another division? Leave out of view the theory which taught that the states alone, regarded as members of an existing compact,

must be considered as the parties to the new system, as they had been to the old, and it would be found that the political equality of the free citizens of the United States could be made a source of that energy and strength so much needed and as yet so little known. With it was connected the idea and the practicability of legislation that would reach and control individuals. Without it there could be only a system of coercion of the states, whose opposition would be invited, rather than repressed, upon all occasions of importance. Abandon the necessary principle of governing by a democratic majority, said George Mason, and if the government proceeds to taxation the states will oppose its power.<sup>1</sup>

On the other hand, the minority, insisting on a rigid construction of their powers, and planting themselves upon the nature of the compact already formed between the states, contended that these separate and sovereign communities had distinct governments already vested with the whole political power of their respective populations, and therefore that they could not, consistently with the truth of their situation, act as if the whole or any considerable part of that power could be transferred by the people themselves to another government. They said, that whatever power was to be conferred on a central or general government must be granted by the states, as political corporations, and that therefore the principle of the Union could not be changed, whatever addition it might be expedient to make to its authority. They said, that, even if this theory were not strictly true, the smaller states could not safely unite with the larger upon any other; and especially that they could not surrender their liberties to the keeping of a majority of the people inhabiting all the states, for such a power would inevitably destroy the state constitutions. They were willing, they said, to enlarge the powers of the federal government; willing to provide for it the means of compelling obedience to its laws; willing to hazard much for the general welfare. But they could not consent to place the very existence of their local governments, with all their capacity to protect the distinct interests of the people, and all their peculiar fitness for the administration of local concerns, at the mercy of

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<sup>1</sup> Yates's Minutes, Elliot, I. 433.

great communities, whose policy might overshadow and whose power might destroy them.

To the claim of political equality as between a citizen of the largest and a citizen of the smallest state in the Union they opposed the doctrine that in his own state every citizen is equal with every other, and holds such rights and liberties, and so much political power, as the state may see fit to bestow upon him; but that, when separate states enter into political relations with each other for their common benefit, it is among the states themselves that the equality must prevail, because states can only be parties to a compact upon a footing of natural equality, just as individuals are supposed to enter society with equal natural rights. This doctrine, they said, was especially necessary to be applied between states of very unequal magnitudes. If applied, it would render unnecessary the division of the legislative body into two chambers; would dispense with any but a supreme judicial tribunal; and would admit of a ratification by the states in Congress, without raising the hazardous and doubtful question of a direct resort to the people, whose power to act independently of their state governments was by some strenuously denied.

These, in substance, were the principles now brought into direct collision, urged under a great variety of forms, and recurring upon the successive details of the Constitution, as its formation proceeded, and pressed with equal earnestness and equally firm convictions of duty on both sides. I confess that it does not seem to me important, if it be practicable, to decide which party was theoretically correct. A great deal of the reasoning on both sides was speculative, and it is not easy to deny some of the chief propositions which were maintained on the one side and the other. We are too apt, perhaps, to judge of the real soundness of the opinions held by opposite parties to the first compromise of the Constitution by the subsequent history and success of the government, and by the views and feelings which we entertain of that history and that success. Whereas, in truth, if we place ourselves at the point where the framers of the Constitution stood at the time we are examining, we shall find that, with the exception of the influence due to one or two governing facts of previous history, it was theoretically as correct to contend for a purely federal as for a purely national government. Almost everything

depends upon the object towards which they were to reason; and therefore the premises were in a considerable degree open to an arbitrary choice. If the object was to establish a government, against the exercise of whose legitimate powers state legislation could not possibly be exerted, some higher authority than that of the state governments must be resorted to; and the reasoning which tended to prove the existence of that authority and the practicability of invoking it, and the danger of any other kind of government, comes logically and consistently in support of the great purpose to be attained. If, however, from an honest fear for the safety of local interests, the purpose was to have a government that would not seriously diminish the powers of the states, but would leave them with always unimpaired sovereignties, capable of resisting the measures of the central power, then the states were certainly competent and sufficient to the formation of such a system, and the reasoning which placed them in the light of parties to a social compact was theoretically true. On the one side, it was believed that a government formed by the states upon the principle of federal equality would be destructive of the powers of the general government, whatever those powers might be. On the other side, it was considered that the principle of governing by a democratic majority of the people of all the states would make those powers too formidable for the safety of the state constitutions. According to the force we may assign to the one or the other tendency, the reasoning on either side will appear to us to be almost equally correct.

But there were, as I have said, one or two facts of previous history which gave the advocates of a national government a great advantage over their opponents, and went far towards settling the real merits of the two opposite systems. A federal system had been tried, and had broken down in complete prostration of all the appropriate energies and functions of government. The advocates of the opposite system, therefore, could point to all the failures and all the defects of the Confederation, in proof of the reasoning which they employed. In addition to this they could adduce the same general tendency in all former confederacies of the same nature. But no experiment had been made by the people of the American states of a government founded expressly on the national character and relations of their inhabitants; and if

the merits of such a government were now only to be maintained by theoretical reasoning, on the other hand it had not suffered the injury of acknowledged defeat.

The difficulty in the way of its adoption was its supposed tendency to absorb, and perhaps to annihilate, the sovereignties of the states. The advocates of the Virginia plan were called upon to show how the general sovereignty and jurisdiction which they proposed to give to their system could consist with a considerable, though subordinate, jurisdiction in the states. One of its moderate and candid opponents<sup>1</sup> declared that, if this could be shown, the objections to it ought to be surrendered; but if not, he thought that those objections must have their full force. But, from the very nature of the case, that which had not been demonstrated by experience could rest only upon opinion; and while the Virginia system made no other provision for state defence against encroachments of the general government than such as might be found in the election by the state legislatures of the national Senate, the apprehensions of the smaller states could not be satisfied, however admirable the theory, and however able might be the reasoning by which it was supported.

Let the reader, then, as he pursues the history of this conflict between the opposing interests of the two classes of states, and observes how strenuously the different theories were maintained, until victory became impossible on either side, note the danger of adhering too firmly to mere theoretical principles in matters of government. He will see the impressive spectacle of states assembled for the formation of some system capable of answering the exigencies of their situation; he will see how rapidly a difference of local interests developed the most opposite theories, and how profoundly those theories were discussed; and he will see this conflict carried on for days, and even for weeks, with all the sincerity that interest lends to conviction, and all the tenacity that conviction can produce, until at last the whole discussion leads to the probable failure of the purpose for which the assembly had been instituted. He will then see an amalgamation of the two systems, which in their integrity were irreconcilable, and will witness the first introduction of that mode of adjusting oppo-

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<sup>1</sup> Dr. Johnson of Connecticut.

site interests and conflicting theories of government which lies at the basis of the Constitution of the United States, and which alone can furnish a safe foundation on which to unite the destinies and wants of separate communities possessed of distinct political organizations and rights.

The Convention had received the report of the committee of the whole on the 19th of June. From that day until the 5th of July the struggle was continued, commencing with the proposition which affirmed the division of the legislative department of the government into two branches. Although such an arrangement did not necessarily involve the principle of national and popular representation, it was opposed as unnecessary by those who desired to retain the system of representation by states, and who therefore intended to preserve the existing organization of the Congress. Still the needful harmony and completeness of the scheme, according to the genius of the Anglo-American liberty, required this division of the legislature.

Doubtless a single council or chamber can promulgate decrees and enact laws; but it had never been the habit of the people of America, as it never had been the habit of their ancestors for at least a period of somewhat more than five centuries, to regard a single chamber as favorable to liberty or to wise legislation.<sup>1</sup> The separation into two chambers of the lords spiritual and temporal, and the commons, in the English Constitution, does not seem to have originated in a difference of personal rank, so much as in their position as separate estates of the realm. All the orders might have voted promiscuously in one house, and just as effectually signified the assent or dissent of Parliament to any measure proposed.<sup>2</sup> But the practice of making the assent of

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<sup>1</sup> Mr. Hallam has traced the present constitution of Parliament to the sanction of a statute in the 15th of Edward II. (1322), which he says recognizes it as already standing upon a custom of some length of time. *Const. History*, I. 5.

<sup>2</sup> Mr. Hallam does not concur in what he says has been a prevailing opinion, that Parliament was not divided into two houses at the first admission of the commons. That they did not sit in separate chambers proves nothing; for one body may have sat at one end of Westminster Hall, and the other at the opposite end. But he thinks that they were never intermingled in voting; and, in proof of this, he adduces the fact that their early grants to the king were separate, and imply distinct grantors, who did not intermeddle with each other's



Parliament to consist in the concurrent and separate action of the two estates, though difficult to be traced to its origin in any distinct purpose or cause, became confirmed by the growing importance of the commons, by their jealousy and vigilance, and by the controlling position which they finally assumed. As Parliament gradually proceeded to its present constitution, and the separate rights and privileges of the two houses became established, it was found that the practice of discussing a measure in two assemblies, composed of different persons, holding their seats by a different tenure and representing different orders of the state, was in the highest degree conducive to the security of the subject and to sound legislation.<sup>1</sup>

So fully was the conviction of the practical convenience and utility of two chambers established in the Anglican mind that, when representative government came to be established in the British North American colonies, although the original reason for the division ceased to be applicable, it was retained for its incidental advantages. In none of these colonies was there any difference of social condition, or of political privilege or power, recognized in the system of representation; and as there were, therefore, no separate estates or orders among the people, requiring to be protected against each other's encroachments, or holding different relations to the crown, we cannot attribute the adherence to the system of two chambers on the part of those who solicited and received the privilege of establishing these colonial governments to anything but their belief in its practical advantages for the purposes of legislation. Still less can we suppose that after the Revolution, and when there no longer existed any such motive as might have influenced the crown in modelling the colonial after the imperial institutions, to a certain extent, the people of these states should have perpetuated in their constitutions the principle

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proceedings. He further shows that in the 11th Edward I. the commons sat in one place and the lords in another; and that in the 8th Edward II. the commons presented a separate petition or complaint to the king, and the same thing occurred in 1 Edward III. He infers from the rolls of Parliament that the houses were divided as they are at present, in the 8th, 9th, and 19th Edward II. See the very valuable Chapter VIII., on the English Constitution, in Hallam's *Middle Ages*, III. 342.

<sup>1</sup> See on this subject Lieber on Civil Liberty, I. 209, edit. 1853.

of a division of the legislature into two chambers for any other purpose than to secure the practical benefits which they and their ancestors had always found to flow from it.

Only three exceptions to this practice existed in America at the time of the formation of the Constitution. They were the legislatures of the states of Pennsylvania and Georgia, and the Congress of the Confederation.

But the Congress being in fact only an assembly of deputies from confederated states, the means scarcely existed for the application of the principle so familiar in the legislatures of most of the states themselves. As a new government was now to be formed, whose theoretical and actual powers were to be essentially different, an opportunity was afforded for the ancient and favorite construction of the legislative department. The proposal was resisted, not because it was doubted that, in a government of direct legislative authority in which the people are themselves to be represented, the system of two chambers is practically the best, but because those who opposed its introduction denied the propriety of attempting to establish a government of that kind. The states of New York, New Jersey, and Delaware, therefore, recorded their votes against such a division of the legislature, and the vote of Maryland was divided upon the question.<sup>1</sup>

The reader will observe, however, that, in its present aspect, there was a chasm in the Virginia plan which to some extent justifies the opposition of the minority to the system of two legislative chambers. According to that plan the people of the states were to be represented in both chambers in proportion to their numbers. But as there were no distinct orders among the people to furnish a different basis for the two houses, the system must either be a mere duplicate representation of the whole people, as it is in the state constitutions generally, or some artificial basis must be provided for one house, to distinguish it from the other, and to furnish a check as between the two. In a republican government, and in a state of society where property is not entailed and distinctions of personal rank cannot exist, such a basis is not easily found; and if found, is not likely to be stable and effectual. The happy expedient of selecting the states as the basis of repre-

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<sup>1</sup> Connecticut upon this question voted with the majority.

sentation in the Senate, which had not yet been agreed upon, and which was resorted to as an adjustment of a serious conflict between two opposite principles of government, has furnished a really different foundation for the two branches, as distinct as the separate representation of the different orders in the British constitution. It has thus secured the incidental advantages of two chambers, without resorting to those fluctuating or arbitrary distinctions among the people which can alone afford, in such a country as ours, even an ostensible difference of origin for legislative bodies.

The same struggle which had been maintained upon this question was continued through all the votes taken upon the mode of electing the members of the two branches, and upon their tenure of office. It is not necessary here to rehearse the details of these proceedings; the result was, that the members of the first branch of the legislature were to be chosen by the people of the states for a period of two years, and to be twenty-five years of age, while the members of the second, or senatorial branch, were to be chosen by the state legislatures for a period of six years, and to be thirty years of age. The states of Pennsylvania and Virginia voted against the election of senators by the legislatures of the states, because it was still uncertain whether an equality or a ratio of representation would finally prevail in that branch, and the election by the legislatures was considered to have a tendency to the adoption of an equality.<sup>1</sup>

At length the sixth resolution, which defined the powers of Congress, and the seventh and eighth, which involved the fundamental point of the suffrage in the two branches, were reached.<sup>2</sup> The subject of the powers of Congress was postponed, and the question was stated on the rule of suffrage for the first branch, which the resolution declared ought to be according to an equitable ratio. In the great debate which ensued, Madison, Hamilton, Gorham, Reed, and Williamson combated the objections of the smaller states, while Luther Martin, with his accustomed warmth, resisted the introduction of the new principle. The discussion involved on both sides a repetition of the arguments previously employed; but some of the views presented are of great importance,

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<sup>1</sup> Madison, Elliot, V. 240.

<sup>2</sup> June 28th.

especially those taken by Madison and Hamilton, of the situation in which the smaller states must be placed, if a constitution should not be formed and adopted containing a just distribution of political power among the whole people of the country, creating thereby a government of sufficient energy to protect each and all of the states against foreign powers, against the influence of the larger members of the Confederacy, and against the dangers to be apprehended from their own governments.

Let each state, said Mr. Madison, depend on itself for its security, in a position of independence of the Union, and let apprehensions arise of dangers from distant powers, or from neighboring states, and from their present languishing condition all the states, large as well as small, would be transformed into vigorous and high-toned governments, with an energy fatal to liberty and peace. The weakness and jealousy of the smaller states would quickly introduce some regular military force against sudden danger from their powerful neighbors; the example would be followed, would soon become universal, and the means of defence against external danger would become the instruments of tyranny at home. These consequences were to be apprehended, whether the states should run into a total separation from each other, or into partial confederacies. Either event would be truly deplorable, and those who might be accessory to either could never be forgiven by their country or by themselves.<sup>1</sup>

To these consequences of a dissolution of the Union, Hamilton added another, equally serious. Alliances, he declared, must be formed with different rival and hostile nations of Europe, who would seek to make us parties to their own quarrels. The representatives of foreign nations having American dominions betrayed the utmost anxiety about the result of that meeting of the states. It had been said that respectability in the eyes of Europe was not the object at which we were to aim; that the proper design of republican government was domestic tranquillity and happiness. This was an ideal distinction. No government could give us tranquillity and happiness at home which did not possess sufficient stability and strength to make us respectable abroad. This was the critical moment for forming such a government. We should

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<sup>1</sup> Madison, Elliot, V. 256.

run every risk in trusting to future amendments. As yet, we retain the habits of union. We are weak, and sensible of our weakness. Henceforward the motives would become feeble and the difficulties greater. It was a miracle that they were here, exercising their tranquil and free deliberations on the subject. It would be madness to trust to future miracles.<sup>1</sup>

But these warnings were of no avail against the settled determination of those who saw greater dangers in the establishment of a government which was in their view to approximate the condition of the states to that of counties in a single state. The principle of a proportionate representation of the populations of the states was just and necessary; but it was now leading to the extreme of an entire separation, because it was carried to the extreme of a full application to every part of the government. In like manner there was an equally urgent necessity for some provision which should receive the states in their political capacity, and on a footing of equality, as constituent parts of the system. But this principle was now forcing the majority into the alternative of a partial confederacy, or of none at all, because it was insisted that the government must be exclusively founded on it. Neither party was ready to adopt the suggestion that the two ideas, instead of being opposed, ought to be combined, so that in one branch the people should be represented, and in the other the states.<sup>2</sup> The consequence was that the proportionate rule of suffrage for the first branch was established by a majority of one state only;<sup>3</sup> and the Convention passed on, with a fixed and formidable minority wholly dissatisfied, to consider what rule should be applied to the Senate.

The objects of a Senate were readily apprehended. They were, in the first place, that there might be a second chamber, with a concurrent authority in the enactment of laws; secondly, that a greater degree of stability and wisdom might reside in its deliberations than would be likely to be found in the other branch

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<sup>1</sup> Madison, Elliot, V. 258.

<sup>2</sup> It was made at this stage by Dr. Johnson.

<sup>3</sup> The states opposed to an equality of suffrage in the first branch were Massachusetts, Pennsylvania, Virginia, North Carolina, South Carolina, and Georgia, 6; those in favor of it were Connecticut, New York, New Jersey, and Delaware. The vote of Maryland was divided.

of the legislative department; and, thirdly, that there might be some diversity of interest between the two bodies. These objects were to be attained by providing for the Senate a distinct and separate basis of its own. If such a basis is found among the individuals composing a political society, it must consist of the distinctions among them either in respect to social rank or in respect to property. With regard to the first, the absence of all distinctions of rank rendered it impossible to assimilate the Senate of the United States to the aristocratic bodies which were found in other governments possessed of two legislative chambers. Property, as held by individuals, might have been assumed as the basis of a distinct representation, if the laws and customs of the different states had generally admitted of its possession in large masses through successive generations. But they did not admit of it. The general distribution and diffusion of property was the rule; its lineal transmission from the father to the eldest son was the exception. Had the Senate been founded upon property, it must have been upon the ratio of wealth as between the different states, in the same manner in which the senatorial representation of counties was arranged under the first constitution of Massachusetts.<sup>1</sup> It was very soon settled and conceded that the states, as political societies, must be preserved; and if they were to be represented as corporations, or as so many separate aggregates of individuals, they must be received into the representation on an equal footing, or according to their relative weight. An inquiry into their relative wealth must have involved the question, as to five of them at least, whether their slaves were to be counted as part of that wealth. No satisfactory decision of this naked question could have been had; and it is to be considered among the most fortunate of the circumstances attending the formation of the Constitution, that this question was not solved with a view of founding the Senate upon the relative wealth of the states.

Two courses only remained. The basis of representation in the Senate must either be found in the numbers of people inhabiting the states, creating an unequal representation, or the people of each state, regarded as one, and as equal with the people of every other state, must be represented by the same number of

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<sup>1</sup> Mr. Baldwin of Georgia suggested this model.

voices and votes. The former was the plan insisted on by the friends and advocates of the "national" system; the latter was the great object on which the minority now rallied all their strength.

The debate was not long protracted; but it was marked with an energy, a firmness, and a warmth on both sides which reveal the nature of the peril then hanging over the unformed institutions whose existence now blesses the people of America. As the delegations of the states approached the decision of this critical question, the result of a separation became apparent, and with it phantoms of coming dissension and strife, of foreign alliances and adverse combinations, loomed in the future. Reason and argument became powerless to persuade. Patriotism, for a moment, lost its sway over men who would at any time have died for their common country. Not mutterings only, but threats even were heard of an appeal to some foreign ally, by the smaller states, if the larger ones should dare to dissolve the Confederacy by insisting on an unjust scheme of government.

Ellsworth, of Connecticut, in behalf of the minority, offered to accept the proportional representation for the first branch, if the equality of the states were admitted in the second, thus making the government partly national and partly federal. It would be vain, he said, to attempt any other than this middle ground. Massachusetts was the only Eastern state that would listen to a proposition for excluding the states, as equal political societies, from an equal voice in both branches. The others would risk every consequence rather than part with so dear a right. An attempt to deprive them of it was at once cutting the body of America in two.

At this moment, foreseeing the probability of an equal division of the states represented in the Convention, one of the New Jersey members<sup>1</sup> proposed that the president should write to the executive of New Hampshire, to request the attendance of the deputies who had been chosen to represent that state, and who had not yet taken seats. Two states only voted for this motion,<sup>2</sup> and the discussion proceeded. Madison, Wilson, and King, with great earnestness, resisted the compromise proposed by Ellsworth, and when

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<sup>1</sup> David Brearley.

<sup>2</sup> New York and New Jersey.

the vote was finally taken, five states were found to be in favor of an equal representation in the senate, five were opposed to it, and the vote of Georgia was divided.<sup>1</sup>

Thus was this assembly of great and patriotic men brought finally to a stand, by the singular urgency with which opposite theories, springing from local interests and objects, were sought to be pressed into a constitution of government that was to be accepted by communities widely differing in extent, in numbers, and in wealth, and in all that constitutes political power, and which were at the same time to remain distinct and separate states. As we look back to the possibility of a failure to create a constitution, and try to divest ourselves of the identity which the success of that experiment has given to our national life, the imagination wanders over a dreary waste of a hundred years, which it can only fill with strange images of desolation. That the administration of Washington should never have existed; that Marshall should never have adjudicated, or Jackson conquered; that the arts, the commerce, the letters of America should not have taken the place which they hold in the affairs of the world; that instead of this great Union of prosperous and powerful republics, made one prosperous and powerful nation, history should have had nothing to show and nothing to record but border warfare and the conflicts of worn-out communities, the sport of the old clashing policies of Europe; that self-government should have become one of the exploded delusions with which mankind have successively deceived themselves, and republican institutions have

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<sup>1</sup> The question was put upon Ellsworth's motion to allow the states an equal representation in the Senate. The vote stood, Connecticut, New York, New Jersey, Delaware, Maryland, *ay*, 5; Massachusetts, Pennsylvania, Virginia, North Carolina, South Carolina, *no*, 5; Georgia divided. The person who divided the vote of Georgia, and thus prevented a decision which must have resulted in a disruption of the Convention, was Abraham Baldwin. We have no account of the motives with which he cast this vote, except an obscure suggestion by Luther Martin, which is not intelligible. (Elliot, I. 356.) Baldwin was a very wise and a very able man. He was not in favor of Ellsworth's proposition, but he probably saw the consequences of forcing the minority states to the alternatives of receiving what they regarded as an unjust and unsafe system, or of quitting the Union. By dividing the vote of his state he prevented this issue, although he also made it probable that the Convention must be dissolved without the adoption of any plan whatever.



been made only another name for anarchy and social disorder—all these things seem at once inconceivable and yet probable—at once the fearful conjurings of fancy and the inevitable deductions of reason.

We know not what combinations, what efforts, might have followed the separation of that convention of American statesmen, without having accomplished the work for which they had been assembled. We do know that, if *they* could not have succeeded in framing and agreeing upon a system of government capable of commending itself to the free choice of the people of their respective states, no other body of men in this country could have done it. We know that the Confederation was virtually at an end; that its power was exhausted, although it still held the nominal seat of authority. The Union must therefore have been dissolved into its component parts but for the wisdom and conciliation of those who, in their original earnestness to secure a perfect theory, had thus encountered an insuperable obstacle and brought about a great hazard. I have elsewhere said that these men were capable of the highest of the moral virtues—that their magnanimity was as great as their intellectual acuteness and strength. Let us turn to the proof on which rests their title to this distinction.

## CHAPTER XXIII.

FIRST GRAND COMPROMISES OF THE CONSTITUTION.—POPULATION OF THE STATES ADOPTED AS THE BASIS OF REPRESENTATION IN THE HOUSE.—RULE FOR COMPUTING THE SLAVES.—EQUALITY OF REPRESENTATION OF THE STATES ADOPTED FOR THE SENATE.

As the states were now exactly divided on the question whether there should be an equality of votes in the second branch of the legislature, some compromise seemed to be necessary, or the effort to make a constitution must be abandoned. A conversation as to what was expedient to be done, resulted in the appointment of a committee of one member from each state, to devise and report some mode of adjusting the whole system of representation.<sup>1</sup>

According to the Virginia plan, as it then stood before the Convention, the right of suffrage in both branches was to be upon some equitable ratio, in proportion to the whole number of free inhabitants in each state, to which three fifths of all other persons, except Indians not paying taxes, were to be added. Nothing had been done to fix the ratio of representation; and although the principle of popular representation had been affirmed by a majority of the Convention as to the first branch, it had been rejected as to the second by an equally divided vote of the states. The whole subject, therefore, was now sent to a committee of compromise, who held it under consideration for three days.<sup>2</sup>

The same struggle which had been carried on in the Convention was renewed in the committee; the one side contending for an inequality of suffrage in both branches, the other for an equal-

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<sup>1</sup> The committee consisted of Gerry, Ellsworth, Yates, Patterson, Franklin, Bedford, Martin, Mason, Davie, Rutledge, and Baldwin.

<sup>2</sup> The committee was appointed on the 2d of July, and made their report on the 5th. The Convention, in the interval, transacted no business.

ity in both. Dr. Franklin at length gave way, and proposed that the representation in the first branch should be according to a fixed ratio of the inhabitants of each state, computed according to the rule already agreed upon, and that in the second branch each state should have an equal vote. The members of the larger states reluctantly acquiesced in this arrangement; the members of the smaller states, with one or two exceptions, considered their point gained. When the report came to be made, it was found that the committee had not only agreed upon this as a compromise, but that they had made a distinction of some importance between the powers of the two branches, by confining to the first branch the power of originating all bills for raising or appropriating money and for fixing the salaries of officers of the government, and by providing that such bills should not be altered or amended in the second branch. This was intended for a concession by the smaller states to the larger.<sup>1</sup> The ratio of representation in the House was fixed by the committee at one member for every forty thousand inhabitants, in which three fifths of the slaves were to be computed; each state not possessing that number of inhabitants to be allowed one member. The number of senators was not designated.

This arrangement was, upon the whole, reasonable and equitable. It balanced the equal representation of the states in the Senate against the popular representation in the House, and it gave to the larger states an important influence over the appropriations of money and the levying of taxes. Nor can the admission of the slaves, in some proportion, into the rule of representation, be justly considered as an improper concession, in a system in which the separate organizations of the states were to be retained, and in which the states were to be represented in proportion to their respective populations.

The report of the committee had recommended that this plan should be taken as a whole; but as its several features were distasteful to different sections of the Convention, and almost all parties were disappointed in the result arrived at by the committee, the several parts of the plan became at once separate subjects of discussion. In the first place, the friends of a pure system of

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<sup>1</sup> See further as to this exclusive power of the House, post.

popular representation in both branches objected to the provision concerning money and appropriation bills, as being no concession on the part of the smaller states, and as a useless restriction.<sup>1</sup> It therefore, in their view, left in force all their objections against allowing each state an equal voice in the Senate. But it was voted to retain it in the report,<sup>2</sup> and the equal vote of the states in the second branch was also retained.<sup>3</sup>

The scale of apportionment of representatives, recommended in the report of the committee, was also objected to on various grounds. It was said that a mere representation of persons was not what the circumstances of the case required; that property as well as persons ought to be taken into the account in order to obtain a just index of the relative rank of the states. It was also urged that, if the system of representation were to be settled on a ratio confined to the population alone, the new states in the West would soon equal, and probably outnumber, the Atlantic States, and thus the latter would be in a minority forever. For these reasons the subject of apportioning the representatives was recommitted to five members,<sup>4</sup> who subsequently proposed a scheme by which the first House of Representatives should consist of fifty-six members, distributed among the states upon an estimate of their present condition,<sup>5</sup> and authorizing the legislature, as future circumstances might require, to increase the number of representatives, and to distribute them among the states upon a compound ratio of their wealth and the numbers of their inhabitants.<sup>6</sup> The latter part of this proposition was adopted, but a new and different apportionment, of sixty-five members for the first meeting of the legislature, was sanctioned by a large vote of the states,

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<sup>1</sup> Madison, Butler, Gouverneur Morris, and Wilson.

<sup>2</sup> Five states voted to retain it, three voted against it, and three were divided. This was treated as an affirmative vote. Elliot, V. 255.

<sup>3</sup> Connecticut, New York, New Jersey, Delaware, Maryland, North Carolina, *ay*, 6; Pennsylvania, Virginia, South Carolina, *no*, 3; Massachusetts, Georgia, divided. Ibid., 285, 286.

<sup>4</sup> Gouverneur Morris, Gorham, Randolph, Rutledge, and King.

<sup>5</sup> They gave to New Hampshire, 2; Massachusetts, 7; Rhode Island, 1; Connecticut, 4; New York, 5; New Jersey, 3; Pennsylvania, 8; Delaware, 1; Maryland, 4; Virginia, 9; North Carolina, 5; South Carolina, 5; Georgia, 2.

<sup>6</sup> Elliot, V. 287, 288.

after a second reference to a committee of one member from each state.<sup>1</sup>

These votes had been taken for the purpose of agreeing upon amendments to the original report of the compromise committee, which they would have so modified as to introduce into it, in place of a ratio of forty thousand inhabitants, including three fifths of the slaves, a fixed number of representatives for the first meeting of the legislature, distributed by estimate among the states, and for all subsequent meetings an apportionment by the legislature itself upon the combined principles of the wealth and numbers of inhabitants of the several states. But in order to understand the objections to the latter part of this proposition, and the modifications that were still to be made in it, it is necessary for us here to recur to that special interest which caused a new and most serious difficulty in the subject of representation, and which now began to be distinctly asserted by those whose duty it was to provide for it. There is no part of the history of the Constitution that more requires to be examined with a careful attention to facts, with an unprejudiced consideration of the purposes and motives of those who became the agents of its great compromises and compacts between sovereign states, and with an impartial survey of the difficulties with which they had to contend.

Twice had the Convention affirmed the propriety of counting the slaves, if the states were to be represented according to the numbers of their inhabitants; and on the part of the slaveholding states there had hitherto been no dissatisfaction manifested with the old proportion of three fifths, originally proposed under the Confederation as a rule for including them in the basis of taxable property. But the idea was now advanced that numbers of inhabitants were not a sufficient measure of the wealth of a state, and that, in adjusting a system of representation between such states as those of the American Union, regard should be had to their relative wealth, since those which were to be the most heavily taxed ought to have a proportionate influence in the government.

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<sup>1</sup> This apportionment gave to New Hampshire, 3; Massachusetts, 8; Rhode Island, 1; Connecticut, 5; New York, 6; New Jersey, 4; Pennsylvania, 8; Delaware, 1; Maryland, 6; Virginia, 10; North Carolina, 5; South Carolina, 5; Georgia, 3.

Hence the plan of combining numbers and wealth in the rule. This was mainly an expedient to prevent the balance of power from passing to the Western from the Atlantic States.<sup>1</sup> It was supposed that the former might in progress of time have the larger amount of population; but that, as the latter would at the commencement of the government have the power in their own hands, they might deal out the right of representation to new states in such proportions as would be most for their own interests. Still there were grave objections to this combined rule of numbers and wealth as applied to the slaveholding states. In the first place, it was extremely vague; it left the question wholly undetermined whether the slaves were to be regarded as persons or as property, and therefore left that question to be settled by the legislature at every revision of the system. Moreover, although this rule might enable the Atlantic States to retain the predominating influence in the government as against the Western interests, it might also enable the Northern to retain the control as against the Southern States, after the former had lost and the latter had gained a majority of population. The proposed conjectural apportionment of members for the first Congress would give thirty-six members to the states that held few or no slaves, and twenty-nine to the states that held many. Mason and Randolph, who represented in a candid manner the objections which Virginia must entertain to such a scheme, did not deny that, according to the present population of the states, the northern part had a right to preponderate; but they said that this might not always be the case; and yet that the power might be retained unjustly, if the proportion on which future apportionments were to be made by the legislature were not ascertained by a definite rule, and peremptorily fixed by the Constitution. Gouverneur Morris, who strenuously maintained the necessity for guarding the interests of the Atlantic against those of the Western States, insisted that the combined principles of numbers and wealth gave a sufficient rule for the legislature; that it was a rule which they could execute; and that it would avoid the necessity of a distinct and special admission of the slaves into the census, an idea which he was sure the people of Pennsylvania would reject. Mr. Madison argued,

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<sup>1</sup> See Mr. Gorham's explanation; *Madison, Elliot*, V. 288.

forcibly, that unfavorable distinctions against the new states that might be formed in the West would be both unjust and impolitic. He thought that their future contributions to the treasury had been much underrated; that the extent and fertility of the Western soil would create a vast agricultural interest; and that, whether the imposts on the foreign supplies which they would require were levied at the mouth of the Mississippi or in the Atlantic ports, their trade would certainly advance with their population, and would entitle them to a rule which should assume numbers to be a fair index of wealth.

The arguments against the combined principles of numbers and wealth, as a mere general direction to the legislature, and against their joint operation upon the contrasted interests of the Western and the Atlantic States, appear to have prevailed with some of the more prominent of the Northern members.<sup>1</sup> Accordingly, when a counter proposition was brought forward by Williamson<sup>2</sup>—which contemplated a return to the principle of numbers alone, and was intended to provide for a periodical census of the free white inhabitants and of three fifths of all other persons, and that the representation should be regulated accordingly—six states, on a division of the question, voted for a census of the free inhabitants, and four states recorded their votes against it.<sup>3</sup> This result brought the Convention to a direct vote upon the naked question whether the slaves should be included as persons, and in the proportion of three fifths, in the census for the future apportionment of representatives among the states.

Massachusetts and Pennsylvania now, for the first time, separated themselves from Virginia. It was perceived that a system of representation by numbers would draw after it the necessity

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<sup>1</sup> Sherman and Gorham.

<sup>2</sup> Of North Carolina.

<sup>3</sup> Massachusetts, Connecticut, New Jersey, Pennsylvania, Virginia, North Carolina, *ay*, 6; Delaware, Maryland, South Carolina, Georgia, *no*, 4. The votes of South Carolina and Georgia were given in the negative, because they desired that the blacks should be included in the census equally with the whites. For the same reason, as we shall see presently, those states voted against the other branch of the proposition, which would give but three fifths of the slaves. But upon what principle, unless it was from general opposition to all numerical representation, the state of Delaware should have voted with them on both of these features of the proposed census, is, I confess, to me inexplicable.

for an admission of the slaves into the enumeration, unless it were confined to the free inhabitants. On the one hand, the delegates of these two states had to look to the probable encouragement of the slave-trade that would follow an admission of the blacks into the representation, and to the probable refusal of their constituents to sanction such an admission. On the other hand, they had to encounter the difficulty of arranging a just rule of popular representation between states which would have no slaves, or very few, and states which would have great numbers of persons in that condition, without giving to the latter class of states some weight in the government proportioned to the magnitude of their populations. But they would not directly admit the naked principle that a slave is to be placed in the same category with a free-man for the purpose of representation, when he has no voice in the appointment of the representative; and the proposition was rejected by their votes and those of four other states.<sup>1</sup> Thereupon the whole substitute of Mr. Williamson, which contemplated numerical representation in the place of the combined rule of numbers and wealth, was unanimously rejected.

The report of the committee of compromise still stood, therefore, but modified into the proposition of a fixed number for the first House of Representatives, and a rule to be compounded of the numbers and wealth of the states, to be applied by the legislature in adjusting the representation in future houses. A difficulty, apparently insuperable, had defeated the application of the simple and—as it might otherwise appropriately be called—the natural rule of numerical representation. The social and political condition of the slave, so totally unlike that of the freeman, presented a problem hitherto unknown in the voluntary construction of representative government. It was certainly true that, by the law of the community in which he was found, and by his normal condition, he could have no voice in legislation. It was equally true that he was no party to the establishment of any state constitution; that nobody proposed to make him a party to the Constitution of the United States, to confer upon him any rights or

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<sup>1</sup> Connecticut, Virginia, North Carolina, Georgia, *ay*, 4; Massachusetts, New Jersey, Pennsylvania, Delaware, Maryland, South Carolina, *no*, 6. South Carolina voted in the negative, for a reason suggested in the previous note, *ante*, p. 410.



privileges under it, or to give to the Union any power to affect or influence his *status* in a single particular. It was true, also, that the condition in which he was held was looked upon with strong disapprobation and dislike by the people of several of the states, and it was not denied by some of the wisest and best of the Southern statesmen that it was a political and social evil.

Still, there were more than half a million of these people of the African race, distributed among five of the states, performing their labor, constituting their peasantry, and—if the numbers of laborers in a community form any just index of its wealth and importance—forming in each of those states a most important element in its relative magnitude and weight. It should be recollected that the problem before the framers of the Constitution was, not how to create a system of representation for a single community possessing in all its parts the same social institutions, but how to create a system in which different communities of mere freemen and other different communities of freemen and slaves could be represented, in a limited government instituted for certain special objects, with a proper regard to the respective rights and interests of those communities, and to the magnitude of the stake which they would respectively have in the legislation by which all were to be affected.<sup>1</sup>

It does not appear, from any records of the discussions that have come down to us, in what way it was supposed the combined rule of numbers and wealth could be applied. If its application were left to Congress, in adjusting the system with reference to slaveholding states, the slaves must be counted as persons or as property; and as the proposed rule did not determine which, they might be treated as persons in one census, and as property in the next, and so on interchangeably. The suggestion of the principle, however, which seemed to be a just one, and which grew out of the conflicting opinions entertained upon the question whether numbers of inhabitants are alone a just index of the wealth of a community, brought into view a very important doctrine that had long been familiar to the American people; namely, that the right of representation ought to be conceded to every community

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<sup>1</sup> See the note on the population of the slaveholding and non-slaveholding states, at the end of this chapter.

on which a tax is to be imposed ; or, as one of the maxims of the revolutionary period expressed it, that "taxation and representation ought to go together." This doctrine was really applicable to the case, and capable of furnishing a principle that would alleviate the difficulty ; for if it could be agreed that, in levying taxes upon a slaveholding state, the wealth that consisted in slaves should be included, the maxim itself demonstrated the propriety of giving as large a proportion of representation as the proportion of tax imposed ; and if, in order to ascertain the representative right of the state, the slaves were to be counted as persons, and in ascertaining the tax to be paid they were to be counted as property, they would not require to be considered in both capacities under either branch of the rule. But in order to give the maxim this application, it would be necessary to concede that the numbers of the slaves and the free persons furnished a fair index of the wealth of one state, as it was necessary to admit that the numbers of its free inhabitants furnished a fair index of the wealth of another state. If the latter were to be assumed, and the taxation imposed upon a state were regulated by its numbers of people, upon the idea that such numbers fairly represented the wealth of the community, it was proper to apply the same principle to the slaves. If this principle were applied to the slaves when ascertaining the amount of taxes to be paid, it ought equally to be applied to them in ascertaining the numbers of representatives to be allowed to the state ; otherwise, the value of the slaves must be ascertained in some other way, for the purposes of taxation ; the value or wealth residing in other kinds of property must be ascertained in the same mode, or under the different rule of assuming numbers of inhabitants as its index ; and the slaves must be excluded as persons from the representation, which they could only enhance by being treated as taxable property.

These further difficulties will appear, as we follow out the various steps taken for the purpose of applying the maxim which connects taxation with representation. The rule now under consideration, as the means of guiding the legislature in future distributions of the right of representation, was that they were to regulate it upon a ratio compounded of the wealth and numbers of inhabitants of the states. Gouverneur Morris now proposed

to add to this, as a proviso, the correlative proposition, "that direct taxation shall be in proportion to representation." This was adopted; and it made the proposed rule of numbers and wealth combined applicable both to taxation and representation.

But in truth it was as difficult to apply the combined rule of wealth and numbers to the subject of taxation, as between the states, as it was to apply it to the right of representation. This was not the first time in the history of the Union that these two subjects had been considered, and had been found to be surrounded with embarrassments. In 1776, when the Articles of Confederation were framed, it became necessary to determine the proportion in which the quotas of contribution to the general treasury should be assessed upon the states. Two obvious rules presented themselves as alternatives; either to apportion the quotas upon an estimate of the wealth of the states, or to assume that numbers of inhabitants of every condition presented a fair index of the pecuniary ability of a state to sustain public burdens. Here again, however, under either of these plans, the question would arise as to the kind of property to be regarded in the basis of the assessment. Should the slaves be treated as part of the property of a slaveholding state, either by a direct computation, or by counting them as part of the population, which was to be considered as the measure of its wealth? Mr. John Adams forcibly maintained that they ought not to be regarded as subjects of federal taxation any more than the free laborers of the Northern States; but that numbers of inhabitants ought to be taken, indiscriminately, as the true index of the wealth of each state; and that thus the slave would stand upon the same footing with the free laborer, both being regarded as the producers of wealth, and therefore that both should add to the quota of tax or contribution to be levied upon the state.<sup>1</sup> Mr. Chase,<sup>2</sup> on the other hand, contended that practically this rule would tax the Northern States on numbers only, while it would tax the Southern States on numbers and wealth conjointly, since the slaves were property as well as persons.

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<sup>1</sup> See Mr. Jefferson's notes of this debate in the Congress of 1776, Works, Vol. I. pp. 26-30. John Adams's Works, Vol. II. pp. 496-498.

<sup>2</sup> Samuel Chase of Maryland.

It is probable, however, that the slaveholding states would, at that time, have agreed to the adoption of numbers as the basis of assessment, if the Northern and Eastern States could have consented to receive the slaves into the enumeration in a smaller ratio than their whole number. But it was insisted that they should be counted equally with the free laborers of the other states; and the result of this attempt to solve a complicated and abstruse question of political economy by a theoretical rule, determining that a slave, as a producer of wealth, stands upon a precise equality with a freeman performing the same species of labor, was that the Congress of 1776 were driven to the adoption of land as a measure of wealth, instead of the more convenient and practicable rule of numbers.<sup>1</sup>

But the Articles of Confederation had not been in operation for two years when it was found that the system of obtaining supplies for the general treasury by assessing quotas upon the states according to an estimate of their relative wealth, represented by the value of their lands, was entirely impracticable; that the value of land must constantly be a source of contention and dissatisfaction between the states; and that, if the mode of defraying the expenses of the Union by requisitions were adhered to, some simpler rule must be adopted. Accordingly, in 1783, the Congress were compelled to return to the rule of numbers; and it was in the effort to agree upon the ratio in which the slaves should enter into that rule that the proportion of three fifths was fixed upon, as a compromise of different views in the amendment then proposed to the Articles of Confederation.<sup>2</sup>

Such had been the previous experience of the Union on the subject of taxation; and now, in 1787, when an effort was to be made to establish a government upon a popular representation of the states which had found it so difficult to agree upon a just and practicable rule for determining their proportions of the public burdens, the whole subject became still further complicated with the difficulties attending the adjustment of this new right of proportional representation. The maxim which would regulate it

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<sup>1</sup> See ante, pp. 142-144.

<sup>2</sup> See Mr. Madison's notes of the debate in the Congress of 1783, Elliot, V. 78-80. Journals of Congress, VIII. 188 (April 18, 1783). Ante, p. 144.

by the same ratio that is applied to the distribution of taxes, contained within itself a just principle; but it went no further than to assert a principle of justice, and it left the subject of the rule itself surrounded by the same difficulties as before. The Southern States complained that their slaves, if counted as property for the purposes of taxation, were to be so counted upon a ratio left wholly to the discretion of Congress; and if counted as numbers for the same purpose, that they ought not to be reckoned in their entire number. They professed their readiness to have representation and taxation regulated by the same rule, but they insisted on the security of a definite rule, to be established in the Constitution itself; and this security, they said, must embrace an admission of the slaves into the basis of representation, if they were to be included in the basis of direct taxation.<sup>1</sup> Accordingly, before the rule as to taxation had been determined, Randolph submitted a distinct proposition, which contemplated a census of the white inhabitants and of three fifths of all other persons, with a peremptory direction to Congress to arrange the representation accordingly.

The Northern States, on the other hand, resisted the direct introduction of the slaves into the representation, as persons; and it was plain that, if they were to be treated as property, and the representation was to be regulated by a rule of wealth, their value as property must be compared with that of other species of personalty held in the same and in other states, and some principles for computing it must be ascertained. Upon such economical questions as these the agreement of different minds, under the influence of different interests, was absolutely impossible.

Thus the knot of these complicated difficulties could only be cut by the sword of compromise. In whatever direction a theoretical rule was applied—whatever view was taken of the slave, as a person or as an article of property; as a productive laborer equally or less valuable to the state when compared with the freeman—whatever principles were maintained upon the question whether numbers constitute a proper measure of the wealth of a community, and one that will work out the same result in com-

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<sup>1</sup> See the remarks of General Pinckney, Mr. Mason, Mr. Butler, and Governor Randolph. Elliot, V. 294–305.

munities where slavery exists, as well as where it is absent—absolute truth, or what the whole country would receive as such, was unattainable. But an adjustment of the problem, founded on mutual conciliation and a desire to be just, was not impossible.

The two objects to be accomplished were to avoid the offence that might be given to the Northern States by making the slaves in direct terms an ingredient in the rule of representation, and, on the other hand, to concede to the Southern States the right to have their representation enhanced by the same enumeration of their slaves that might be adopted for the purpose of apportioning direct taxation. These objects were effected by an arrangement proposed by Wilson. It consisted, first, in affirming the maxim that representation ought to be proportioned to direct taxation; and then, by directing a periodical census of the free inhabitants, and three fifths of all other persons, to be taken by the authority of the United States, and that the direct taxation should be apportioned among the states according to this census of persons. The principle was thus established that, for the purpose of direct taxation, the number of inhabitants in each state should be assumed as the measure of its relative wealth; and that its right of representation should be regulated by the same measure; and as the slaves were to be admitted into the rule for taxation in the proportion of three fifths of their number only—apparently upon the supposition that the labor of a slave is less valuable to the state than the labor of a freeman—so they were in the same proportion only to enhance the representation. This expedient was adopted by the votes of a large majority of the states;<sup>1</sup> but since it had been moved as an amendment to the proposition previously accepted, which affirmed that the representation ought to be regulated by the combined rule of numbers and wealth, it appeared, when brought into that connection, to rest the representation of the slaveholding states in respect to the slaves, in part at least, upon the idea of property. To avoid all discrepancy in the application of the rule to the two subjects of representation and taxation, Governor Randolph proposed to strike the word “wealth” from the resolution; and this, having been done by a vote nearly

<sup>1</sup> Connecticut, Pennsylvania, Maryland, Virginia, North Carolina, Georgia, *ay*, 6; New Jersey, Delaware, *no*, 2; Massachusetts, South Carolina, divided.

unanimous,<sup>1</sup> left the enumeration of the slaves for both purposes an enumeration of persons, in less than their whole numbers; placing them in the rule for taxation, not as property and subjects of taxation, but as constituting part of an assumed measure of the wealth of a state, just as the free inhabitants constituted another part of the same measure, and placing them in the same ratio and in the same capacity in the rule for representation.<sup>2</sup>

The basis of the House of Representatives having been thus agreed to, the remaining part of the report, which involved the basis of the Senate, was then taken up for consideration. Wilson, King, Madison, and Randolph still opposed the equality of votes in the Senate, upon the ground that the government was to act upon the people and not upon the states, and therefore the people, not the states, should be represented in every branch of it. But the whole plan of representation embraced in the amended report, including the equality of votes in the Senate, was adopted, by a bare majority, however, of the states present.<sup>3</sup>

When this result was announced, Governor Randolph complained of its embarrassing effect on that part of the plan of a constitution which concerned the powers to be vested in the general government; all of which, he said, were predicated upon the idea of a proportionate representation of the states in both branches of the legislature. He desired an opportunity to modify the plan, by providing for certain cases to which the equality of votes should be confined; and in order to enable both parties to consult informally upon some expedient that would bring about a unanimity, he proposed an adjournment. On the following morning, we are told by Mr. Madison, the members opposed to an equality of votes in the Senate became convinced of the impolicy

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<sup>1</sup> The only opposition was from Delaware, the vote of which was divided.

<sup>2</sup> See the note at the end of this chapter.

<sup>3</sup> Connecticut, New Jersey, Delaware, Maryland, North Carolina (Mr. Spaight, *no*), *ay*, 5; Pennsylvania, Virginia, South Carolina, Georgia, *no*, 4; Massachusetts divided (Mr. Gerry, Mr. Strong, *ay*, Mr. King, Mr. Gorham, *no*). The delegates of New York were all absent; Messrs. Yates and Lansing left the Convention on the 5th of July, after the principle of popular representation had been adopted. Colonel Hamilton was absent on private business. If the two former had been present, the vote of the state would doubtless have been given in favor of the report, on account of the basis which it gave to the Senate.

of risking an agreement of the states upon any plan of government by an inflexible opposition to this feature of the scheme proposed, and it was tacitly allowed to stand.<sup>1</sup>

Great praise is due to the moderation of those who made this concession to the fears and jealousies of the smaller states. That it was felt by them to be a great concession no one can doubt who considers that the chief cause which had brought about this convention of the states was the inefficiency of the "federal" principle on which the former Union had been established. Looking back to all that had happened since the Confederation was formed—to the repeated failures of the states to comply with the constitutional demands of the Congress, and to the entire impracticability of a system that had no true legislative basis, and could therefore exert no true legislative power—we ought not to be surprised that the retention of the principle of an equal state representation in any part of the new government should have been resisted so strenuously and so long.

That the final concession of this point was also a wise and fortunate determination there can be no doubt. Those who made it probably did not foresee all its advantages, or comprehend all its manifold relations. They looked to it, in the first instance, as the means of securing the acceptance of the Constitution by all the states, and thus of preventing the evils of a partial confederacy. They probably did not at once anticipate the benefits to be derived from giving to a majority of the states a check upon the legislative power of a majority of the whole people of the United States. Complicated as this check is, it both recognizes and preserves the residuary sovereignty of the states; it enables them to hold the general government within its constitutional sphere of action, and it is in fact the only expedient that could have been successfully adopted to preserve the state governments, and to avoid the otherwise inevitable alternative of conferring on the general government plenary legislative power upon all subjects. It is a part of the Constitution which it is vain to try by any standard of theory; for it was the result of a mere compromise of opposite theories and conflicting interests. Its best eulogium is to be found in its practical working, and in what it did to pro-

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<sup>1</sup> Elliot, V. 319.



duce the acceptance of a constitution believed, at the time of its adoption, to have given an undue share of influence and power to the larger members of the Confederacy.<sup>1</sup>

<sup>1</sup> Mr. Madison, who was to the last a strenuous opponent of the equality of votes in the Senate, candidly and truly stated its merits in the 62d number of the *Federalist*, as they had been disclosed to him by subsequent reflection.

#### NOTE ON THE POPULATION OF THE SLAVEHOLDING AND NON-SLAVEHOLDING STATES.

Although, at the time of the formation of the Constitution, slavery had been expressly abolished in two of the states only (Massachusetts and New Hampshire), the framers of that instrument practically treated all but the five Southern States as if the institution had been already abolished within their limits, and counted all the colored persons therein, whether bond or free, as part of the free population; assuming that the eight Northern and Middle States would be free states, and that the five Southern States would continue to be slave states. This appears from the whole tenor of the debates, in which the line is constantly drawn, as between slaveholding and non-slaveholding states, so as to throw eight states upon the Northern and five upon the Southern side. I have found also, in a newspaper of that period (*New York Daily Advertiser*, February 5, 1788) the following

"ESTIMATE OF THE POPULATION OF THE STATES MADE AND USED IN THE FEDERAL CONVENTION, ACCORDING TO THE MOST ACCURATE ACCOUNTS THEY COULD OBTAIN."

New Hampshire,	. . . . .	102,000
Massachusetts,	. . . . .	360,000
Rhode Island,	. . . . .	58,000
Connecticut,	. . . . .	202,000
New York,	. . . . .	238,000
New Jersey,	. . . . .	188,000
Pennsylvania,	. . . . .	360,000
Delaware,	. . . . .	87,000
		—————1,495,000
Maryland, including three fifths of 80,000 negroes,		218,000
Virginia,	" " 280,000 "	420,000
North Carolina,	" " 60,000 "	200,000
South Carolina,	" " 80,000 "	150,000
Georgia,	" " 20,000 "	90,000
		—————1,078,000

The authenticity of this table is established by referring to a speech made

by General Pinckney in the legislature of South Carolina, in which he introduced and quoted it at length. (Elliot's Debates, IV. 288.)

From this it appears that the estimated population of the eight Northern and Middle States, adopted in the Convention, was 1,495,000; that of the five Southern States (including three fifths of an estimated number of negroes) was 1,078,000. Comparing this estimate with the results of the first census, it will be seen that the *total* population of the eight Northern and Middle States exceeds the *federal* population of the five Southern States, in the census of 1790, in about the same ratio as the former exceeds the latter in the estimate employed by the Convention. Thus in 1790 the *total* population of the eight Northern and Middle States, including all slaves, was 1,845,595; the *federal* population of the five Southern States, including three fifths of the slaves, was 1,540,048 — excess 305,547. In the estimate of 1787 the population allotted to the eight Northern and Middle States was 1,495,000; that allotted to the five Southern States, counting only three fifths of the estimated number of slaves, was 1,078,000 — excess in favor of the eight states, 417,000. This calculation shows, therefore, that, in estimating the population of the different states for the purpose of adjusting the first representation in Congress, the Convention applied the rule of three fifths of the slaves to the five Southern States only, and that as to the other eight states no discrimination was made between the different classes of their inhabitants. Other methods of comparing the estimate of 1787 with the census of 1790 will lead to the same conclusion.

## CHAPTER XXIV.

POWERS OF LEGISLATION.—CONSTITUTION AND CHOICE OF THE EXECUTIVE.—CONSTITUTION OF THE JUDICIARY.—ADMISSION OF NEW STATES.—COMPLETION OF THE ENGAGEMENTS OF CONGRESS.—GUARANTEE OF REPUBLICAN CONSTITUTIONS.—OATH TO SUPPORT THE CONSTITUTION.—RATIFICATION.—NUMBER OF SENATORS.—QUALIFICATIONS FOR OFFICE.—SEAT OF GOVERNMENT.

OF the remaining subjects comprehended in the report of the committee of the whole, it will only be necessary here to make a brief statement of the action of the Convention, before we arrive at the stage at which the principles agreed upon were sent to a committee of detail to be cast into the forms of a constitution.

Recurring to the sixth resolution in the report of the committee of the whole, an addition was made to its provisions, by inserting a power to legislate in all cases for the general interests of the Union; and for the clause giving the legislature power to negative certain laws of the states, the principle was substituted of making the legislative acts and treaties of the United States the supreme law of the land, and binding upon the judiciaries of the several states.

The constitution of the executive department had been provided for, by declaring that it should consist of a single person, to be chosen by the national legislature for a period of seven years, and to be ineligible a second time; to have power to carry into execution the national laws, to appoint to offices not otherwise provided for, to be removable on impeachment, and to be paid for his services by a fixed stipend out of the national treasury. The mode of constituting this department did not, as in the case of the legislative, present the question touching the nature of the government described by the terms "federal" and "national." It was entirely consistent with either plan—with that of a union formed by the states in their political capacities, or with one

formed by the people of the states, or with one partaking of both characters—that the executive should be chosen mediately or immediately by the people, or by the legislatures or executives of the states, or by the national legislature.

The same contest, therefore, between the friends and opponents of a national system was not obliged to be renewed upon this department. So long as the form to be given to the institution was consistent with a system of republican government—so long as it provided an elective magistrate, not appointed by an oligarchy, and holding by a responsible and defeasible tenure of office—whether he should be chosen by the people of the states, or by some of their public servants, would not affect the principles on which the legislative power of the government was to be founded. But this very latitude of choice, as to the mode of appointment and the duration of office, opened the greatest diversity of opinion. In the earlier stages of the formation of a plan of government of three distinct departments, the idea of an election of the executive by the people at large was scarcely entertained at all. It was not supposed to be practicable for the people of the different states to make an intelligent and wise choice of the kind of magistrate then contemplated—a magistrate whose chief function was to be that of an executive agent of the legislative will. Regarding the office mainly in this light, without having yet had occasion to look at it closely as the source of appointments to other offices and as the depositary of a check on the legislative power itself, the framers of the plan now under consideration had proposed to vest the appointment in the legislature, as the readiest mode of obtaining a suitable incumbent, without the tumults and risks of a popular election. But the power of appointment to other offices and the revisionary check on legislation were no sooner annexed to the executive office than it was perceived that some provision must be made for obviating the effects of its dependence on the legislative branch. An executive chosen by the legislature must be to a great extent the creature of those from whom his appointment was derived.

To counteract this manifestly great inconvenience and impropriety the incumbent of the executive office was to be ineligible a second time. This, however, was to encounter one inconvenience by another, since the more faithfully and successfully the duties of

the station might be discharged, the stronger would be the reasons for continuing the individual in office. The ineligibility was accordingly stricken out. Hence it was that a variety of propositions concerning the length of the term of office were attempted, as expedients to counteract the evils of an election by the legislature of a magistrate who was to be re-eligible; and among them was one which contemplated "good behavior" as the sole tenure of the office.<sup>1</sup> This proposition was much considered; it received the votes of four states out of ten;<sup>2</sup> and it is not at all improbable that it would have received a much larger support if the supposed disadvantages of an election by the people had led a majority of the states finally to retain the mode of an election by the national legislature.<sup>3</sup> But in consequence of the impossibility of

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<sup>1</sup> Moved by Dr. McClurg, one of the Virginia delegates, and the person appointed in the place of Patrick Henry, who declined to attend the Convention.

<sup>2</sup> New Jersey, Pennsylvania, Delaware, Virginia, *ay*, 4; Massachusetts, Connecticut, Maryland, North Carolina, South Carolina, Georgia, *no*, 6.

<sup>3</sup> I understand Mr. Madison to have voted for this proposition, and that his view of it was that it might be a necessary expedient to prevent a dangerous union of the legislative and executive departments. He said that the propriety of the plan of an executive during good behavior would depend on the practicability of instituting a tribunal for impeachments as certain and as adequate in the case of the executive as in the case of the judges. His remarks, of course, were predicated upon the idea of a final necessity for retaining the choice of the executive by the legislature. In a note to his "Debates," appended to the vote on this question, it is said: "This vote is not to be considered as any certain index of opinion, as a number in the affirmative probably had it chiefly in view to alarm those attached to a dependence of the executive on the legislature, and thereby to facilitate some final arrangement of a contrary tendency. The avowed friends of an executive 'during good behavior' were not more than three or four, nor is it certain they would have adhered to such a tenure." (Madison, Elliot, V. 327.) By "the avowed friends of an executive during good behavior," I understand Mr. Madison to mean those who would have preferred that tenure, under all forms and modes of election. I can trace in the debates no evidence that any other person except Gouverneur Morris was indifferent to the mode in which the executive should be chosen, provided he held his place by this tenure. Whether Hamilton held this opinion, and adhered to it throughout, is a disputed point. In a letter to Timothy Pickering, written in 1803, he says that his final opinion was against an executive during good behavior, "on account of the increased danger to the public tranquillity incident to the election of a magistrate of this degree of permanency." In proof of this view of the subject, he remarks: "In the plan of a Constitution which I drew up while the Convention was sitting,

agreeing upon a proper length of term for an executive that was to be chosen by the legislature, the majority of the Convention went back to the plan of making the incumbent ineligible a second time, which implied that some definite term was to be adopted. This again compelled them to consider in what other mode the executive could be appointed, so as to avoid the evil of subjecting the office to the unrestrained influence of the legislature, and to remove the restriction upon the eligibility of the officer for a second term.

In an election of the chief executive magistrate by the people, voting directly, the right of suffrage would have to be confined to the free inhabitants of the several states. But even with respect to the free inhabitants, the right of suffrage was differently regulated in the different states; and there must either be a uniform and special rule established as to the qualification of voters for the executive of the United States, or the rule of suffrage of each state must be adopted for this as well as other national elections. In the Northern States, too, the right of suffrage was much more diffused than in the Southern, and the question must arise, as it had arisen in the construction of the representative system, whether the states were to possess an influence in the choice of a chief magistrate for the Union in proportion to the number of their inhabitants, or only in proportion to their qualified voters or their free inhabitants.

The substitution of electors would obviate these difficulties, by affording the means of determining the precise weight in the election that should be allotted to each state, without attempting to prescribe a uniform rule of suffrage in the primary elections, and without being obliged to settle the discrepancies between the election laws of the states. They furnished, also, the means of removing the election from the direct action of the people, by confiding the ultimate selection to a body of men to be chosen for the express purpose of exercising a real choice among the eminent individuals who might be thought fit for the station. But the mode of choice was complicated with the other questions of re-

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and which I communicated to Mr. Madison about the close of it, perhaps a day or two after, the office of president has no longer duration than for three years." (Niles's Register, November 7th, 1812.) In this he was probably mistaken. See Hamilton's Works, II. 401. Madison, Elliot, V. 584.

eligibility, and especially with that of impeachment. If appointed by electors, there would be danger of their being corrupted by the person in office, if he were eligible a second time, or by a candidate who had not filled the station. Hence there would be a propriety in making the executive subject to impeachment while in office. If chosen by the legislature, it seemed to be generally agreed that the executive ought not to be eligible a second time; but whether he ought to be subject to impeachment, and by what tribunal, was a subject on which there were great differences of opinion.

The consequence of this great diversity of views was, that the plan embraced in the ninth resolution of the committee of the whole was retained and sent to the committee of detail.

With respect to the judiciary, several important changes were made in the plan of the committee of the whole. The prohibition against any increase of salary of the individuals holding the office was stricken out, and the restriction was made applicable only to a diminution of the salary. The cognizance of impeachments of national officers was taken from their jurisdiction, and the principle was adopted which extended that jurisdiction to "all cases arising under the national laws, and to such other questions as may involve the national peace and harmony." The power to appoint inferior judicial tribunals was confirmed to the national legislature.

The fourteenth resolution, providing for the admission of new states, was unanimously agreed to.

The fifteenth resolution, providing for the continuance of Congress and for the completion of their engagements, was rejected.

The principle of the sixteenth resolution, which provided a guarantee by the United States of the institutions of the states, was essentially modified. In the place of a guarantee applicable both to a republican constitution and the "existing laws" of a state, the declaration was adopted, "that a republican form of government shall be guaranteed to each state, and that each state shall be protected against foreign and domestic violence."<sup>1</sup>

The seventeenth resolution, that provision ought to be made for future amendments, was adopted without debate.<sup>2</sup>

<sup>1</sup> Ante, Chap. XXI.

<sup>2</sup> At this point (July 23d) John Langdon and Nicholas Gilman took their seats as delegates from New Hampshire.

The eighteenth resolution, requiring the legislative, executive, and judicial officers of the states to be bound by oath to support the Articles of Union, was then extended to include the officers of the national government.

The next subject that occurred in the order of the resolutions was that of the proposed ratification of the new system by the people of the states, acting through representative bodies to be expressly chosen for this purpose, instead of referring it for adoption to the legislatures of the states.

As this is a subject on which very different theories are maintained, arising partly from different views of the historical facts, and as there are very different degrees of importance attached to the mode in which the framers of the Constitution provided for its establishment, it will be convenient here to state the position in which they found themselves at this period in their deliberations, the purposes which they had in view, and the steps which they took to accomplish their objects.

They were engaged in preparing a new system of government, and in providing for its introduction. When they were first called together the general purpose of the states may seem to have been confined to a mode of introducing changes in the fundamental compact of the Union, such as was provided for by the Articles of Confederation. But the Convention had found itself obliged, from the sheer necessities of the country, to go far beyond the Confederation, and to make a total change in the principle of the government. It became, therefore, necessary for them to provide a mode of enacting or establishing this change, which would commend itself to the confidence of the people, by its conformity with their previous ideas of constitutional action, and be at the same time consonant with reason and truth.

Again, there was a peculiarity in their situation which rendered it quite different from that of the delegates of a people who had abolished a pre-existing government, and had assembled a representative body to form a new one. The Confederation still existed. As a compact between sovereign states, providing for a special mode in which alterations of its articles were to be made, and limiting their adoption to the case of unanimous consent, it was still in force. The states, in their political capacities as sovereign communities, were still the parties to the compact, and



their legislatures alone were clothed with the authority to change its provisions. It was necessary, therefore, to encounter and to solve the question, whether a new government, framed upon a principle unlike that of the Confederation, and embracing an entirely different legislative authority, could be established in the mode prescribed by the existing compact of the states; and if it could not, whether there existed any power, apart from the state governments, by which it could be established and be clothed with a paramount authority, resting on a basis of principle, and not upon force, fiction, or fraud.

In the early formation of the Union that took place before the Declaration of Independence, questions of the constitutional power of the colonies which became members of it could scarcely arise at all, since those who undertook to act for and to represent the people of each colony were proceeding upon revolutionary principles and rights. But before the Articles of Confederation, which constituted the first union of the states upon ascertained and settled principles of government, had been agreed upon, many of the state constitutions were formed; and when those articles were entered into, the state governments represented the sovereignty of distinct political communities, and were entirely competent to form such a confederacy as was then established by their joint and unanimous consent. All the obligations which the Confederation imposed upon its members rested upon the states in their corporate capacities; and the government of each of them was competent to assume, for the state, such obligations and to enter into such stipulations. In the same way it was competent to the state governments to make alterations in the Articles of Confederation, by unanimous consent, so long as those alterations did not change the fundamental principle of the Union, which was that of a system of legislation for the states in their corporate capacities.

But when it was proposed to reverse this principle, and to create a government, external to the governments of the states, clothed with authority to exact obedience from the individual inhabitants of the states, and to act upon them directly, the question might well arise whether the state governments were competent to cede such an authority over their constituents, and whether it could be granted by anybody but the people themselves. It

might, it is true, be said that their constitutions made the governments of the states the depositaries of the sovereignty and political powers of the people inhabiting those states. But if this was true in a general sense for the purpose of exercising the political powers of the people, it was not true in any sense for the purpose of granting away those powers to other agents. The latter could only be done by those who had constituted the first class of agents, and who were able to say that certain portions of the authority with which they had been clothed should be withdrawn, and be revested in another class.

Undoubtedly it would have been possible to have given the Constitution of the United States a theoretical adoption by the people of the states, by committing its acceptance to the state legislatures, relying on the acquiescence of the people in their acts. But there were two objections to this course. The one was that the legislatures were believed less likely than the people to favor the establishment of such a government as that now proposed. The other was that the kind of legal fiction by which the presumed assent of the people must be reached, in this mode, would leave room for doubts and disputes as to the real basis and authority of the government, which ought, if possible, to be avoided.

Another difficulty of a kindred nature rendered it equally inexpedient to rely on the sanction of the state legislatures. The states, in their corporate capacities, and through the agency of their respective governments, were parties to a federal system which they had stipulated with each other should be changed only by unanimous consent. The Constitution, which was now in the process of formation, was a system designed for the acceptance of the people of all the states, if the assent of all could be obtained; but it was also designed for the acceptance of a less number than the whole of the states, in case of a refusal of some of them; and it was at this time highly probable that at least two of them would not adopt it. Rhode Island had never been represented in the Convention; and the whole course of her past history with reference to enlargements of the powers of the Union made it quite improbable that she would ratify such a plan of government as was now to be presented to her. The state of New York had, through her delegates, taken part in the proceed-

ings until the final decision which introduced into the government a system of popular representation; but two of those delegates, entirely dissatisfied with that decision, had withdrawn from the Convention and had gone home to prepare the state for the rejection of the scheme.<sup>1</sup> The previous conduct of the state had made it not at all unlikely that their efforts would be successful. Nor were there wanting other indications of the most serious dissatisfaction, on the part of men of great influence in some of the other states. Unanimity had already become hopeless, if not impracticable; and it was necessary, therefore, to look forward to the event of an adoption of the system by a less number than the whole of the states, and to make it practicable for a less number to form the new Union for which it provided. This could only be done by presenting it for ratification to the people of each state, who possessed authority to withdraw the state government from the Confederation, and to enter into new relations with the people of such other states as might also withdraw from the old and accept the new system.

There was another and more special reason for resorting to the direct sanction of the people of the states, which has already been referred to in general terms, but for which we must look still more closely into the nature of the system proposed. In that system the legislative authority was to reside in the concurrent action of a majority of the people and a majority of the states. How could the state government of Delaware, for example, confer upon a majority of the representatives of the people of all the states, and a majority of the representatives of all the states, that might adopt the new Constitution, power to bind the people of Delaware by a legislative act to which their own representatives might have refused their assent? The state government was appointed and established for the purpose of binding the people of the state by legislative acts of their own servants and immediate representatives; but not for the purpose of consenting that legislative power over the people of that state should be exercised by agents not delegated by themselves. Yet such a consent was involved in the new system now to be proposed, and was, in some way—by some safe and competent method—to be obtained. A

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<sup>1</sup> See the letter of Messrs. Yates and Lansing to Governor Clinton, Elliot, I. 480.

legislative power was to be created by the assembling in one branch of the representatives of the people of all the states, in proportion to their numbers, and in the other branch by assembling an equal number of representatives of each state, without regard to its numbers of people. The authority of law, upon all subjects that might be committed to this legislative power, was to attend the acts of concurring majorities in both branches, even against the separate and adverse will of the minority. It was impossible to rest this authority upon any other basis than that of the ratification of the system by the people of each state, to be given by themselves in primary assemblies, or by delegates expressly chosen in such assemblies, and appointed to give it, if they should see fit. A system founded on the consent of the legislatures would be a treaty between sovereign states; a system founded on the consent of the people would be a constitution of government, ordained by those who hold and exercise all political power.<sup>1</sup>

There were not wanting, however, strong advocates of a reference to the state legislatures; and the votes of three of the states were at first given for that mode of ratifying the Constitution; but the other plan was finally adopted with nearly unanimous consent.<sup>2</sup>

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<sup>1</sup> There seems to be a sound distinction between the two, which was pointed out by Mr. Madison. He said that "he considered the difference between a system founded on the legislatures only, and one founded on the people, to be the true difference between a *league*, or treaty, and a *constitution*. The former, in point of *moral obligation*, might be as inviolable as the latter. In point of *political operation* there were two important distinctions in favor of the latter. First, a [state] law violating a treaty ratified by a pre-existing [state] law might be respected by the judges as a law, though an unwise or perfidious one. A [state] law violating a constitution established by the people themselves would be considered by the judges as null and void. Secondly, the doctrine laid down by the law of nations in the case of treaties was, that a breach of any one article by any of the parties freed the other parties from their engagements. In the case of a union of people under one constitution, the nature of the pact had always been understood to exclude such an interpretation." Elliot, V. 355, 356.

<sup>2</sup> Connecticut, Delaware, and Maryland voted for an amendment to the original resolution, which, if adopted, would have submitted the Constitution to the state legislatures. The resolution to refer it to assemblies chosen for the purpose by the people was subsequently adopted, with the dissent of one state only, Delaware.

Still, the resolution under consideration contained a feature which wisely provided for the assent of the existing Congress to the changes that were to be made by the establishment of the new system. It proposed that the plan of the new Constitution should be first submitted to Congress for its approbation, and that the legislatures of the states should then recommend to the people to institute assemblies to consider and decide on its adoption. These steps were to be taken in pursuance of the course marked out when the Convention was called. The resolution of Congress which recommended the Convention required that the alterations which it might propose should be "agreed to in Congress and confirmed by the states;" and such was the tenor of the instructions given to the delegates of most of the states. This direction would be substantially complied with if the legislatures, on receiving and considering the system, should recommend to the people to appoint representative bodies to consider and decide on its adoption, and the people should so adopt and ratify it.<sup>1</sup>

The topics covered by the report of the committee of the whole had thus been passed upon in the Convention, and the outline of the Constitution had been framed. There remained only three subjects on which it would be necessary to act in order to provide for a complete scheme of government. It was necessary to determine the number of senators to which each state should be entitled; to ascertain the qualifications of members of the government; and to determine at what place the government should be seated.

The number of senators was not agreed upon at the time when the principle of an equal representation of the states in the senate was adopted; and it had not been determined in what method they were to vote. It was now settled that the Senate should consist of two members from each branch, and that they should vote *per capita*. To this arrangement one state only dissented. The vote of Maryland was given against it, through the influence of Luther Martin, who considered this method of voting a departure from the idea of the states being represented in the Senate. But this objection was obviously unsound; for although,

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<sup>1</sup> For the history of the proceedings relating to the institution of the national Convention, see ante, Chap. XV.

by this method of voting, the influence of a state *may* be divided, its members have the *power* to concur, and to make the vote of the state more effectual than it would be if it had only a single suffrage.

The subject of the qualifications to be required of the executive, the judiciary, and the members of both branches of the legislature went to the committee of detail in a form which was subsequently modified in a very important particular. It was at first proposed<sup>1</sup> that landed property, as well as citizenship in the United States, should be embraced in the qualifications. But there were solid objections to this requirement, founded on the circumstances of the country and the nature of a republican constitution. So far as the people of the United States could be said to be divided into classes, the principal divisions related to the three occupations of agriculture, commerce, and manufactures of all kinds, including in the latter all who exercised the mechanic arts. As a general rule it was supposed at that time to be true, that the commercial and manufacturing classes held very little landed property; and that although they were much less numerous than the agricultural class, yet that they were likely to increase in a far greater ratio than they had hitherto. Practically, therefore, to require a qualification of landed property would be to give the offices of the general government to the agricultural interest. These considerations led the Convention, by a nearly unanimous vote, to reject the proposition for a landed qualification.<sup>2</sup>

Very serious doubts were also entertained, whether, in constructing a republican constitution, it was proper to pay so much deference to distinctions of wealth as would be implied by the adoption of any property qualification for office. There are two methods in which the interests of property may be secured in the organization of a representative government. It may be required as a qualification, either of the elector or the elected, that the individual shall possess a certain amount of property. But it seems scarcely consistent with the spirit of a republican constitution that this should be made a qualification for holding office, although it may be quite proper to require some degree of property, or its

<sup>1</sup> By Mason.

<sup>2</sup> Maryland alone voted to retain it.

equivalent evidence of moral fitness, as a qualification for the right of choosing to office. The solid reason for a distinction is, that, in order to have a property qualification for office at all efficient, or even of any perceptible operation, it must be made so large that it will tend to exclude persons of real talent, or even the highest capacity for the public service. Whereas, a property qualification may be applied to the exercise of the elective franchise, by requiring so small an amount that it will practically exclude but few who possess the moral requisites for its intelligent and honest use; and even to this extent the operation of such a rule may be, as it is in some well-governed communities, greatly relieved, by substituting for the positive possession of any amount of property that species of evidence of moral fitness for the right of voting that is implied by the capacity to pay a very small portion of the public burdens.<sup>1</sup>

At the present stage, however, of the formation of the Constitution of the United States, the opinions of a majority of the states were in favor of a property qualification for office, as well as a requirement of citizenship; and the committee of detail were instructed accordingly, with the dissent of only three of the states.<sup>2</sup> But, as we shall afterwards find, another view of the subject finally prevailed.<sup>3</sup>

No definite action was had, at this stage, upon the subject of a seat of the national government; but it was almost unanimously agreed to be the general sense of the country that it ought not to be placed at the seat of any state government, or in any large commercial city; and that provision ought to be made by Congress, as speedily as possible, for the establishment of a national seat and the erection of suitable public buildings.

Such was the character of the system sent to a committee of detail, to be put into the form of a constitution.<sup>4</sup> Before it was sent to them, however, notice was given by an eminent Southern

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<sup>1</sup> As in the state of Massachusetts; where the sole money qualification required of a voter is the payment of an annual poll-tax of \$1.25, or about five shillings sterling.

<sup>2</sup> Connecticut, Pennsylvania, and Delaware.

<sup>3</sup> See the title "Qualifications" in the Index.

<sup>4</sup> The committee of detail, appointed July 24th, consisted of Messrs. Rutledge, Randolph, Gorham, Ellsworth, and Wilson. Elliot, V. 357.

member, which looked to the introduction of provisions not yet contemplated or discussed. According to Mr. Madison's minutes, General Pinckney rose and reminded the Convention that, if the committee should fail to insert some security to the Southern States against an emancipation of slaves, and taxes on exports, he should be bound by duty to his state to vote against their report.<sup>1</sup>

The resolutions as adopted by the Convention, together with the propositions offered by Mr. Charles Pinckney on the 29th of May, and those offered by Mr. Patterson on the 15th of June, were then referred to a committee of detail.<sup>2</sup>

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<sup>1</sup> By a security against an emancipation of slaves, General Pinckney meant some provision for their extradition in cases of escape into the free states. This is apparent from the history of the extradition clause; and it is upon the notice thus given by him, and the action had upon this clause, that the statement often made, which assumes that the Constitution could not have been established without some provision on this subject—as well as upon general reasoning from the circumstances of the case—rests for its proof. See as to the origin and history of the extradition clause, post, p. 602.

<sup>2</sup> The resolutions, as referred, were as follows :

" 1. *Resolved*, That the government of the United States ought to consist of a supreme legislative, judiciary, and executive.

" 2. *Resolved*, That the legislature consist of two branches.

" 3. *Resolved*, That the members of the first branch of the legislature ought to be elected by the people of the several states for the term of two years; to be paid out of the public treasury; to receive an adequate compensation for their services; to be of the age of twenty-five years at least; to be ineligible to, and incapable of holding, any office under the authority of the United States (except those peculiarly belonging to the functions of the first branch) during the term of service of the first branch.

" 4. *Resolved*, That the members of the second branch of the legislature of the United States ought to be chosen by the individual legislatures; to be of the age of thirty years at least; to hold their offices for six years, one third to go out biennially; to receive a compensation for the devotion of their time to the public service; to be ineligible to, and incapable of holding, any office under the authority of the United States (except those peculiarly belonging to the functions of the second branch) during the term for which they are elected, and for one year thereafter.

" 5. *Resolved*, That each branch ought to possess the right of originating acts.

" 6. *Resolved*, That the national legislature ought to possess the legislative rights vested in Congress by the Confederation; and, moreover, to legislate in all cases for the general interests of the Union, and also in those to which the



states are separately incompetent, or in which the harmony of the United States may be interrupted by the exercise of individual legislation.

"7. *Resolved*, That the legislative acts of the United States, made by virtue and in pursuance of the Articles of Union, and all treaties made and ratified under the authority of the United States, shall be the supreme law of the respective states, as far as those acts or treaties shall relate to the said states, or their citizens and inhabitants; and that the judiciaries of the several states shall be bound thereby in their decisions, anything in the respective laws of the individual states to the contrary notwithstanding.

"8. *Resolved*, That, in the original formation of the legislature of the United States, the first branch thereof shall consist of sixty-five members; of which number, New Hampshire shall send three; Massachusetts, eight; Rhode Island, one; Connecticut, five; New York, six; New Jersey, four; Pennsylvania, eight; Delaware, one; Maryland, six; Virginia, ten; North Carolina, five; South Carolina, five; Georgia, three. But as the present situation of the states may probably alter in the number of their inhabitants, the legislature of the United States shall be authorized, from time to time, to apportion the number of representatives; and in case any of the states shall hereafter be divided, or enlarged by addition of territory, or any two or more states united, or any new states created within the limits of the United States, the legislature of the United States shall possess authority to regulate the number of representatives, in any of the foregoing cases, upon the principle of their number of inhabitants, according to the provisions hereafter mentioned, namely: Provided always that representation ought to be proportioned to direct taxation. And in order to ascertain the alteration in the direct taxation which may be required from time to time by the changes in the relative circumstances of the states—

"9. *Resolved*, That a census be taken within six years from the first meeting of the legislature of the United States, and once within the term of every ten years afterwards, of all the inhabitants of the United States, in the manner and according to the ratio recommended by Congress in their resolution of the 18th of April, 1783; and that the legislature of the United States shall proportion the direct taxation accordingly.

"10. *Resolved*, That all bills for raising or appropriating money, and for fixing the salaries of the officers of the government of the United States, shall originate in the first branch of the legislature of the United States, and shall not be altered or amended by the second branch; and that no money shall be drawn from the public treasury, but in pursuance of appropriations to be originated by the first branch.

"11. *Resolved*, That, in the second branch of the legislature of the United States, each state shall have an equal vote.

"12. *Resolved*, That a national executive be instituted, to consist of a single person; to be chosen by the national legislature, for the term of seven years; to be ineligible a second time; with power to carry into execution the national laws; to appoint to offices in cases not otherwise provided for; to be removable on impeachment and conviction of malpractice or neglect of duty; to re-

ceive a fixed compensation for the devotion of his time to the public service, to be paid out of the public treasury.

"13. *Resolved*, That the national executive shall have a right to negative any legislative act; which shall not be afterwards passed, unless by two third parts of each branch of the national legislature.

"14. *Resolved*, That a national judiciary be established, to consist of one supreme tribunal, the judges of which shall be appointed by the second branch of the national legislature; to hold their offices during good behavior; to receive punctually, at stated times, a fixed compensation for their services, in which no diminution shall be made so as to affect the persons actually in office at the time of such diminution.

"15. *Resolved*, That the national legislature be empowered to appoint inferior tribunals.

"16. *Resolved*, That the jurisdiction of the national judiciary shall extend to cases arising under laws passed by the general legislature; and to such other questions as involve the national peace and harmony.

"17. *Resolved*, That provision ought to be made for the admission of states lawfully arising within the limits of the United States, whether from a voluntary junction of government and territory or otherwise, with the consent of a number of voices in the national legislature less than the whole.

"18. *Resolved*, That a republican form of government shall be guaranteed to each state; and that each state shall be protected against foreign and domestic violence.

"19. *Resolved*, That provision ought to be made for the amendment of the Articles of Union, whensoever it shall seem necessary.

"20. *Resolved*, That the legislative, executive, and judiciary powers, within the several states, and of the national government, ought to be bound, by oath, to support the Articles of Union.

"21. *Resolved*, That the amendments which shall be offered to the Confederation by the Convention ought, at a proper time or times, after the approbation of Congress, to be submitted to an assembly or assemblies of representatives, recommended by the several legislatures, to be expressly chosen by the people to consider and decide thereon.

"24. *Resolved*, That the representation in the second branch of the legislature of the United States shall consist of two members from each state, who shall vote *per capita*.

"23. *Resolved*, That it be an instruction to the committee to whom were referred the proceedings of the Convention for the establishment of a national government, to receive a clause, or clauses, requiring certain qualifications of property and citizenship in the United States, for the executive, the judiciary, and the members of both branches of the legislature of the United States."

## CHAPTER XXV.

### REPORT OF THE COMMITTEE OF DETAIL.—CONSTRUCTION OF THE LEGISLATURE.—TIME AND PLACE OF ITS MEETING.

HAVING now reached that stage in the process of framing the Constitution at which certain principles were confided to a committee of detail, the reader will now have an opportunity to observe the further development and application of those principles, the mode in which certain chasms in the system were supplied, and the final arrangements which produced the complete instrument that was submitted to the people of the United States for their adoption.

Great power was necessarily confided to a committee to whom was intrusted the first choice of means and of terms that were to give practical effect to the principles embraced in the resolutions of the Convention. There might be a substantial compliance with the intentions previously indicated by the debates and votes of the Convention, and at the same time the mode in which those intentions should be carried out by the committee might require a new consideration of the subjects involved. Hence it is important to pursue the growth of the Constitution through the entire proceedings.

The committee of detail presented their report on the 6th of August, in the shape of a Constitution divided into three-and-twenty articles. It is not my purpose to examine this instrument in the precise order of its various provisions, or to describe all the discussions which took place upon its minute details. It is more consonant with the general purpose of this history to group together the different features of the Constitution which relate to the structure and powers of the different departments and to the fundamental purposes of the new government.<sup>1</sup>

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<sup>1</sup> The first draft of the Constitution, reported by the committee of detail, will be found in the Appendix.

In accordance with the previous decisions of the Convention, the committee of detail had provided that the legislative power of the United States should be vested in a Congress, to consist of two branches, a House of Representatives and a Senate, each of which should have a negative on the other. But as to the persons by whom the members of the national legislature were to be appointed, no decision had been made in the Convention, excepting that the members of the House were to be chosen by the people of the states, and the members of the Senate by their legislatures. Nothing had been settled respecting the qualifications of the electors of representatives; nor had the qualifications of the members of either branch been determined.<sup>1</sup> Two great questions, therefore, remained open; first, with what class of persons was the election of members of the popular branch of the legislature to be lodged; secondly, what persons were to be eligible to that and to the other branch. In substance these questions resolved themselves into the inquiry, in whom was the power of governing America to be vested? for it is to be remembered that, according to a decision of the Convention not yet reversed, the national executive was to be chosen by the national legislature.

So far as the people of the United States had evinced any distinct purpose, at the time when this Convention was assembled, it appeared to be well settled that the new system of government, whatever else it might be, should be republican in its form and spirit. When the states had assembled in Convention it became the result of a necessary compromise between them that the appointment of one branch of the legislature should be vested in the people of the several states. But who were to be regarded as the people of a state, for this purpose, was a question of great magnitude, now to be considered.

The situation of the country, in reference to this as well as to many other important questions, was peculiar. The streams of emigration, which began to flow into it from Europe at the first settlement of the different colonies, had been interrupted only by the war of the Revolution. On the return of peace the tide of

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<sup>1</sup> A general instruction had been given to report "certain qualifications of property and citizenship," for the executive, the judiciary, and the members of both houses of Congress.

emigration again began to set towards the new states, which had risen into independent existence on the western shores of the Atlantic by a struggle for freedom that had attracted the attention of the whole civilized world; and when the Constitution of the United States was about to be framed, large and various classes of individuals in the different countries of Europe were eagerly watching the result of the experiment. It appeared quite certain that great accessions of population would follow the establishment of free institutions in America, if they should be framed in a liberal and comprehensive spirit. It became necessary, therefore, to meet and provide for the presence in the country of great masses of persons not born upon the soil, who had not participated in the efforts by which its freedom had been acquired, and who would bring with them widely differing degrees of intelligence and of fitness to take part in the administration of a free government. The place that was to be assigned to these persons in the political system of the country was a subject of much solicitude to its best and most thoughtful statesmen.

On the one hand, all were aware that there existed among the native populations of the states a very strong American feeling, engendered by the war, and by the circumstances attending its commencement, its progress, and its results. It was a war begun and prosecuted for the express purpose of obtaining and securing, for the people who undertook it, the right of self-government. It necessarily created a great jealousy of foreign influence, whether exerted by governments or individuals, and a strong fear that individuals would be made the agents of governments in the exercise of such influence. The political situation of the country under the Confederation had increased rather than diminished these apprehensions. The relations of the states with each other and with foreign nations, under a system which admitted of no efficient national legislation binding upon all alike, afforded, or were believed to afford, means by which the policy of other countries could operate on our interests with irresistible force.

There was, therefore, among the people of the United States, and among their statesmen who were intrusted with the formation of the Constitution, a firmly settled determination that the institutions and legislation of the country should be effectually guarded against foreign control or interference.

On the other hand, it was extremely important that nothing should be done to prevent the immigration from Europe of any classes of men who were likely to become useful citizens. The states which had most encouraged such immigration had advanced most rapidly in population, in agriculture, and the arts. There were, too, already in the country many persons of foreign birth who had thoroughly identified themselves with its interests and its fate, who had fought in its battles, or contributed of their means to the cause of its freedom; and some of these men were at this very period high in the councils of the nation, and even occupied places of great importance in the Convention itself.<sup>1</sup> They had been made citizens of the states in which they resided, by the state power of naturalization; and they were in every important sense Americans. It was impossible, therefore, to adopt a rule that would confine the elective franchise, or the right to be elected to office, to the native citizens of the states. The states themselves had not done this; and the institutions of the United States could not rest on a narrower basis than the institutions of the states.

Another difficulty which attended the adjustment of the right of suffrage grew out of the widely differing qualifications annexed to that right under the state constitutions, and the consequent dissatisfaction that must follow any effort to establish distinct or special qualifications under the national Constitution. In some of the states the right of voting was confined to "freeholders;" in others—and by far the greater number—it was extended beyond the holders of landed property, and included many other classes of the adult male population; while in a few it embraced every male citizen of full age who was raised at all above the level of the pauper by the smallest evidence of contribution to the public burdens. The consequence, therefore, of adopting any separate system of qualifications for the right of voting under the Constitution of the United States would have been that, in some of the states, there would be persons capable of voting for the highest state officers, and yet not permitted to vote for any officer of the

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<sup>1</sup> It is only necessary to mention the names of Hamilton, Wilson, Robert Morris, and Fitzsimmons, to show the entire impracticability of a rule that would have excluded all persons of *foreign birth* from being electors, or from being elected to office.

United States; and that in the other states persons not admitted to the exercise of the right under the state constitution might have enjoyed it in national elections.

This embarrassment, however, did not extend to the qualifications which it might be thought necessary to establish for the right of being elected to office under the general government. As the state and the national governments were to be distinct systems, and the officers of each were to exercise very different functions, it was both practicable and expedient for the Constitution of the United States to define the persons who should be eligible to the offices which it created.

At the same time, in relation to both of these rights—that of electing and that of being elected to national offices—it was highly necessary that the national authority, either by direct provision of the Constitution, or by a legislative power to be exercised under it, should determine the period when the rights of citizenship could be acquired by persons of foreign birth. From the first establishment of the state governments down to the present period those governments had possessed the power of naturalization. Their rules for the admission of foreigners to the privileges of citizenship were extremely unlike; and if the power of prescribing the rule were to be left to them, and the Constitution of the United States were to adopt the qualifications of voters fixed by the laws of the states, or were to be silent with respect to the qualifications of its own officers, the rights both of electing and of being elected to national office would, in respect to citizenship, be regulated by no uniform principle. If, therefore, the right of voting for any class of federal officers were to be in each state the same as that given by the state laws for the election of any class of state officers, it was quite essential that the states should surrender to the general government the power to determine, as to persons of foreign birth, what period of residence in the country should be required for the rights of citizenship. It was equally necessary that the national government should possess this power, if it was intended that citizenship should be regarded at all in the selection of those who were to fill the national offices.

The committee of detail, after a review of all these considerations, presented a scheme that was well adapted to meet the difficulties of the case. They proposed that the same persons who, by

the laws of the several states, were admitted to vote for members of the most numerous branch of their own legislatures, should have the right to vote for the representatives in Congress. The adoption of this principle avoided the necessity of disfranchising any portion of the people of a state by a system of qualifications unknown to their laws. As the states were the best judges of the circumstances and temper of their own people, it was certainly best to conciliate them to the support of the new Constitution by this concession. It was possible, indeed, but not very probable, that they might admit foreigners to the right of voting without the previous qualification of citizenship. It was possible, too, that they might establish universal suffrage in its most unrestricted sense. But against all these evils there existed one great security: namely, that the mischiefs of an absolutely free suffrage would be felt most severely by themselves in their domestic concerns; and against the special danger to be apprehended from the indiscriminate admission of foreigners to the right of voting, another feature of the proposed plan gave the national legislature power to withhold from persons of foreign birth the privileges of general citizenship, although a state might confer upon them the power of voting without previous naturalization.

This part of the scheme consisted in the transfer of the power of naturalization to the general government; a power that was necessarily made exclusive, by being made a power to establish a *uniform* rule on the subject.

These provisions were not only necessary in the actual situation of the states, but they were also in harmony with the great purpose of the representative system that had been agreed upon as the basis of one branch of the legislative power. In that branch the people of each state were to be represented; but they were to remain the people of a distinct community, whose modes of exercising the right of self-government would be peculiar to themselves; and that would obviously be the most successful representation of such a people in a national assembly which most conformed itself to their habits and customs in the organization of their own legislative bodies. Accordingly, although very strenuous efforts were made to introduce into the Constitution of the United States particular theories with regard to popular suffrage—some of the members being in favor of one restriction and some of another—the



rule which referred the right in each state to its domestic law was sustained by a large majority of the Convention. But the power that was given, by unanimous consent, over the subject of naturalization, shows the strong purpose that was entertained of vesting in the national authority an efficient practical control over the states in respect to the political rights to be conceded to persons not natives of the country.<sup>1</sup>

As we have already seen, the committee of detail had been instructed to report qualifications of property and citizenship for the members of every department of the government. But they found the subject so embarrassing that they contented themselves with providing that the legislature of the United States should have authority to establish such uniform qualifications for the members of each house, with regard to property, as they might deem expedient.<sup>2</sup> They introduced, however, into their draft of a Constitution, an express provision that every member of the House of Representatives should be of the age of twenty-five years at least, should have been a citizen of the United States for at least three years before his election, and should be, at the time of his election, a resident in the state in which he might be chosen.<sup>3</sup>

A property qualification for the members of the House of Representatives was a thing of far less consequence than the fact of citizenship. Indeed, there might well be a doubt whether a requisition of this kind would not be in some degree inconsistent with the character that had already been impressed upon the government by the compromise which had settled the nature of the representation in the popular branch. It was to be a representation of the people of the states; and as soon as it was determined that the right of suffrage in each state should be just as broad as the legislative authority of the state might see fit to make it, the basis of the representation became a democracy, without any restrictions save those which the people of each state might impose

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<sup>1</sup> I have called the naturalization power a *practical* control upon the states in the matter of suffrage. It is indirect, but it is effectual; for I believe that no state has ever gone so far as, by express statutory or constitutional provision, to admit to the right of voting persons of foreign birth who are not naturalized citizens of the United States.

<sup>2</sup> Art. VI. Sect. 2 of the reported draft.

<sup>3</sup> *Ibid.*, Art. IV. Sect. 2.

upon it for themselves. If, then, the Constitution were to refrain from imposing on the electors a property qualification, for the very purpose of including all to whom the states might concede the right of voting within their respective limits, thus excluding the idea of a special representation of property, it was certainly not necessary to require the possession of property by the representatives, or to clothe the national legislature with power to establish such a qualification. The clause reported by the committee of detail for this purpose was accordingly left out of the Constitution.<sup>1</sup>

But with respect to citizenship, as a requisite for the office of a representative or a senator, very different considerations applied. With whatever degree of safety the states might be permitted to determine who should vote for a representative in the national legislature, it was necessary that the Constitution itself should meet and decide the grave questions, whether persons of foreign birth should be eligible at all, and if so, at what period after they had acquired the general rights of citizens. It seems highly probable, from the known jealousies and fears that were entertained of foreign influence, that the eligibility to office would have been strictly confined to natives, but for a circumstance to which allusion has already been made. The presence of large numbers of persons of foreign birth who had adopted, and been adopted by, some one of the states, who stood on a footing of equality with the native inhabitants, and some of whom had served the country of their adoption with great distinction and unsuspected fidelity, was the insuperable obstacle to such a provision. The objection arising from the impolicy of discouraging future immigration had its weight; but it had not the decisive influence which was conceded to the position of those foreigners already in the country and already enjoying the rights of citizenship under the laws and constitutions of the several states. That men should be perpetually ineligible to office under a constitution which they had assisted in making could not be said to be demanded by the people of America.

The subject, therefore, was found of necessity to resolve itself into the question, what period of previous citizenship should be

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<sup>1</sup> New Hampshire, Massachusetts, and Georgia alone voted to retain it. Elliot, V. 404.

required? The committee of detail proposed three years. Other members desired a much longer period. Hamilton, on the other hand, supported by Madison, proposed that no definite time should be established by the Constitution, and that nothing more should be required than citizenship and inhabitancy. He thought that the discretionary power of determining the rule of naturalization would afford the necessary means of control over the whole subject. But this plan did not meet the assent of a majority of the states, and, after various periods had been successively rejected, the term of seven years' citizenship as a qualification of members of the House of Representatives was finally established.

But was this qualification to apply to those foreigners who were then citizens of the states, and who, as such, would have the right to vote on the acceptance of the Constitution? Were they to be told that, although they could ratify the Constitution, they could not be eligible to office under it until they had enjoyed the privileges of citizenship for seven years? They had been invited hither by the liberal provisions of the state institutions; they had been made citizens by the laws of the state where they resided; the Articles of Confederation gave them the privileges of citizens in every other state; and thus the very communities by which this Convention had been instituted were said to have pledged their public faith to these persons that they should stand upon an equality with all other citizens. It is a proof that their case was thought to be a strong one, and it is a striking evidence of the importance attached to the principles involved, that an effort was made to exempt them from the operation of the rule requiring a citizenship of seven years, and that it was unsuccessful.<sup>1</sup>

It is impossible now to determine how numerous this body of persons were in whose favor the attempt was made to establish an exception to the rule; and their numbers constitute a fact that is now historically important only in its bearing upon a principle of the Constitution. From the arguments of those who sought to introduce the exception, it appears that fears were entertained that the retrospective operation of the rule would expose the ac-

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<sup>1</sup> The Constitution of Pennsylvania had given to foreigners, after two years' residence, all the rights of citizens. There were similar provisions in nearly all of the states.

ceptance of the Constitution to great hazards; for the states, it was said, would be reduced to the dilemma of rejecting it, or of violating the faith pledged to a part of their citizens. Accordingly the implied obligation of the states to secure to their citizens of foreign birth the same privileges with natives was urged with great force, and it was inferred from the notorious inducements that had been held out to foreigners to emigrate to America, and to avail themselves of the easy privileges of citizenship. Whether the United States were in any way bound to redeem these alleged pledges of the states was a nice question of casuistry that was a good deal debated in the discussion. But in truth there was no obligation of public faith in the case, the disregard of which could be justly made a matter of complaint by anybody. When the states had made these persons citizens, and through the Articles of Confederation had conferred upon them the privileges of citizens in every state in the Union, they did not thereby declare that such adopted citizens should be immediately eligible to any or all of the offices under any new government which the American people might see fit to establish at any future time. To have said that they never should be eligible would have been to establish a rule that would have excluded some of the most eminent statesmen in the country. But the period in their citizenship when they should be made eligible was just as much an open question of public policy as the period of life at which all native and all adopted citizens should be deemed fit to exercise the functions of legislators. If the citizen of foreign birth was disfranchised by the one requirement, the native citizen was equally disfranchised by the other, until the disability had ceased. The question was decided, therefore, and rightly so, upon large considerations of public policy; and the principal reasons that exercised a controlling influence upon the decision, and caused the refusal to establish any exception to the rule, afford an interesting proof of the national tone and spirit that were intended to be impressed upon the government at the beginning of its history.

It was quite possible, as all were ready to concede, that the time might arrive when the qualification of so extended a period of citizenship as seven years might not be practically very important; since the people, after having been long accustomed to the duty of selecting their representatives, would not often be induced

to confer their suffrages upon a foreigner recently admitted to the position of a citizen. The mischiefs, too, that might be apprehended from such appointments would be far less, after the policy of the government had been settled and the fundamental legislation necessary to put the Constitution into activity had been accomplished. But the first Congress that might be assembled under the Constitution would have a work of great magnitude and importance to perform. Indeed, the character which the government was to assume would depend upon the legislation of the few first years of its existence. Its commercial regulations would then be mainly determined. The relations of the country with foreign nations, its position towards Europe, its rights and duties of neutrality, its power to maintain a policy of its own, would all then be ascertained and settled. Nothing, therefore, could be more important than to prevent persons having foreign attachments from insinuating themselves into the public councils; and with this great leading object in view the Convention refused, though by a mere majority only of the states, to exempt from the rule those foreigners who had been made citizens under the naturalization laws of the states.<sup>1</sup>

Thus it appears that the Constitution of the United States discloses certain distinct purposes with reference to the participation of foreigners in the political concerns of the country. In the first place, it was clearly intended that there should be no real discouragement to immigration. The position and history of the country from its first settlement, its present and prospective need of labor and capital, its territorial extent, and the nature of its free institutions, were all inconsistent with any policy that would prevent the redundant population of Europe from finding in it an asylum. Accordingly the emigrant from foreign lands was placed under no perpetual disqualifications. The power of naturalization that was conferred upon the general government, and the accom-

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<sup>1</sup> The members who advocated the exemption were G. Morris, Mercer, Gorham, Madison, and Wilson; those who opposed it were Rutledge, Sherman, General Pinckney, Mason, and Baldwin. The states voting for it were Connecticut, New Jersey, Pennsylvania, Maryland, Virginia, 5; the states voting against it were New Hampshire, Massachusetts, Delaware, North Carolina, South Carolina, Georgia, 6. The question elicited a good deal of feeling, and was debated with some warmth.

panying circumstances attending its transfer by the states, show an intention that some provision should be made for the admission of emigrants to the privileges of citizenship, and that in this respect the inducements to a particular residence should be precisely equal throughout the whole of the states. The power was not to remain dormant, under ordinary circumstances, although there might undoubtedly be occasions when its exercise should be suspended. The intention was that the legislature of the United States should always exercise its discretion on the subject; but the existence of the power, and the reasons for which it was conferred, made it the duty of the legislature to exercise that discretion according to the wants of the country and the requirements of public policy.

In the second place, it is equally clear that the founders of the government intended that there should be a real, as well as formal, renunciation of allegiance to the former sovereign of the emigrant—a real adoption, in principle and feeling, of the new country to which he had transferred himself—an actual amalgamation of his interests and affections with the interests and affections of the native population—before he should have the power of acting on public affairs. This is manifest from the discretionary authority given to Congress to vary the rule of naturalization from time to time as circumstances might require—an authority that places the states under the necessity of restricting their right of suffrage to citizens, if they would avoid the evils to themselves of an indiscriminate exercise of that right by all who might choose to claim it. The period of citizenship, too, that was required as a qualification for a seat in the popular branch of the government, and which was extended to nine years for the office of senator, was placed out of the discretionary power of change by the legislature, in order that an additional term, beyond that required for the general rights of citizenship, might forever operate to exclude the dangers of foreign predilections and an insufficient knowledge of the duties of the station.

No one who candidly studies the institutions of America, and considers what it was necessary for the founders of our government to foresee and provide for, can hesitate to recognize the wisdom and the necessity of these provisions. A country of vast extent opened to a boundless immigration which nature invited

and which man could scarcely repel—a country, too, which must be governed by popular suffrage—could not permit its legislative halls to be invaded by foreign influence. The independence of the country would have been a vain and useless achievement if it had not been followed by the practical establishment of the right of self-government by the native population; and that right could be secured for their posterity only by requiring that foreigners, who claimed to be regarded as a part of the people of the country, should be first amalgamated in spirit and interest with the mass of the nation.

No other changes were made in the proposed qualifications for the representatives, excepting to require that the person elected should be an *inhabitant* of the state for which he might be chosen at the time of election, instead of being a *resident*. This change of phraseology was adopted to avoid ambiguity, the object of the provision being simply to make the representation of the state a real one.

The Convention, as we have seen, had settled the rule for computing the number of inhabitants of a state for the purposes of representation, and had made it the same with that for apportioning direct taxes among the states.<sup>1</sup> The committee of detail provided that there should be one representative for every forty thousand inhabitants, when Congress should find it necessary to make a new apportionment of representatives; a ratio that had not been previously sanctioned by a direct vote of the Convention, but which had been recommended by the committee of compromise at the time when the nature of the representation in both houses was adjusted.<sup>2</sup> This ratio was now adopted in the article relating to the House of Representatives, but not before an effort was made to exclude the slaves from the enumeration.<sup>3</sup> The renewed discussion of this exciting topic probably withdrew the attention of members from the consideration of the numbers of the representatives, and nothing more was done, at the time we are now examining, than to make a provision that the number should not exceed one for every forty thousand inhabitants. But at a subsequent stage of the proceedings,<sup>4</sup> before the Constitution was

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<sup>1</sup> Ante, Chap. XXIII.

<sup>2</sup> See post, as to the compromise on this subject.

<sup>3</sup> See ante, Chap. XXIV.

<sup>4</sup> September 8th.

sent to the committee of revision, Wilson, Madison, and Hamilton endeavored to procure a reconsideration of this clause for the purpose of establishing a more numerous representation of the people. Hamilton, who had always and earnestly advocated the introduction of a strong democratic element into the Constitution, although he desired an equally strong check to that element in the construction of the Senate, is represented to have expressed himself with great emphasis and anxiety respecting the representation in the popular branch. He avowed himself, says Mr. Madison, a friend to vigorous government, but at the same time he held it to be essential that the popular branch of it should rest on a broad foundation. He was seriously of opinion that the House of Representatives was on so narrow a scale as to be really dangerous, and to warrant a jealousy in the people for their liberties.<sup>1</sup>

But the motion to reconsider was lost,<sup>2</sup> and it was not until the Constitution had been engrossed and was about to be signed that an alteration was agreed to, at the suggestion of Washington. This was the only occasion on which he appears to have expressed an opinion upon any question depending in the Convention. With the habitual delicacy and reserve of his character, he had confined himself strictly to the duties of a presiding officer throughout the proceedings. But now, as the Constitution was likely to go forth with a feature that would expose it to a serious objection, he felt it to be his duty to interpose. But it was done with great gentleness. As he was about to put the question he said that he could not forbear expressing his wish that the proposed alteration might take place. The smallness of the proportion of representatives had been considered by many members, and was regarded by him, as an insufficient security for the rights and interests of the people. Late as the moment was, it would give him much satisfaction to see an amendment of this part of the plan adopted. The intimation was enough; no further opposition was offered, and the ratio was changed to one representative for thirty thousand inhabitants.<sup>3</sup>

It is now necessary to trace the origin of a peculiar power of

<sup>1</sup> Elliot, V. 530.

<sup>2</sup> By a majority of one state. Ibid.

<sup>3</sup> That is to say, Congress were authorized to apportion one representative to thirty thousand inhabitants, but not to exceed that number. Constitution, Art. I. § 2.



the House of Representatives that is intimately connected with the practical compromises on which the government was founded, although the circumstances and reasons of its introduction into the Constitution are not generally understood. I refer to the exclusive power of originating what are sometimes called "money bills." In making this provision the framers of our government are commonly supposed to have been guided wholly by the example of the British Constitution, upon an assumed analogy between the relations of the respective houses in the two countries to the people and to each other. This view of the subject is not wholly correct.

At an early period in the deliberations, when the outline of the Constitution was prepared in a committee of the whole, a proposition was brought forward to restrain the Senate from originating money bills, upon the ground that the House would be the body in which the people would be the most directly represented, and in order to give effect to the maxim which declares that the people should hold the purse-strings. The suggestion was immediately encountered by a general denial of all analogy between the English House of Lords and the body proposed to be established as the American Senate. In truth, as the construction of the Senate then stood in the resolutions agreed to in the committee of the whole, the supposed reason for the restriction in England would have been inapplicable; for it had been voted that the representation in the Senate should be upon the same proportionate rule as that of the House, although the members of the former were to be chosen by the legislatures, and the members of the latter by the people, of the states. It was rightly said, therefore, at this time, that the Senate would represent the people as well as the House; and that if the reason in England for confining the power to originate money bills to the House of Commons was that they were the immediate representatives of the people, the reason had no application to the two branches proposed for the Congress of the United States.<sup>1</sup> It was, however, admitted

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<sup>1</sup> Let the reader consult Mr. Hallam's acute and learned discussion of this exclusive privilege of the House of Commons (Const. Hist., III. 87-46) and he will probably be satisfied that, whatever theoretical reasons different writers may have assigned for it, its origin is so obscure, and its precise limits and purposes, deduced from the precedents, are so uncertain, that it can now be said to rest

that, if the representation in the Senate should not finally be made a proportionate representation of the people of the several states, there might be a cause for introducing this restriction.<sup>1</sup> This intimation referred to a reason that subsequently became very prominent. But when first proposed the restriction was rejected in the committee by a vote of seven states against three, there being nothing involved in the question at that time excepting the theoretical merits of such a distinction between the powers of the two houses.<sup>2</sup>

But other considerations afterwards arose. When the final struggle came on between the larger and the smaller states upon the character of the representation in the two branches, the plan of restricting the origin of money bills to the House of Representatives presented itself in a new aspect. The larger states were required to concede an equality of representation in the Senate; and it was supposed, therefore, that they would desire to increase the relative power of the branch in which they would have the greatest numerical strength. The five states of Massachusetts, Pennsylvania, Virginia, North Carolina, and South Carolina had steadily resisted the equality of votes in the Senate. When it was at length found that the states were equally divided on this question, and it became necessary to appoint the first committee of compromise, the smaller states tendered to the five larger ones the exclusive money power of the House as a compensation for the sacrifice required of them. It was so reported by the committee of compromise; and although it met with resistance in the Convention, and was denied to be a concession of any impor-

on no positive principles. Its basis is custom, which, having no definite beginning, is now necessarily immemorial. It would not be quite safe, therefore, to reason upon the well-defined provision of our Constitution as if there were a close analogy between the situation of the two houses of Congress and the two branches of the British legislature. The English example certainly had an influence in suggesting the plan of such a restriction; but care must be taken not to overlook the peculiar arrangements which made it so highly expedient that it may be said to have been a necessity, even if there had been no British example.

<sup>1</sup> C. Pinckney. Elliot, V. 189. June 18th.

<sup>2</sup> On the question for restraining the Senate from originating money bills, New York, Delaware, Virginia, *ay*, 3; Massachusetts, Connecticut, New Jersey, Maryland, North Carolina, South Carolina, Georgia, *no*, 7. Ibid.

tance to the larger states, it was retained in the report,<sup>1</sup> and thus formed a special feature of the resolutions sent to the committee of detail. But those resolutions had also established the equality of representation in the Senate, and the whole compromise, with its several features, had, therefore, been once fully ascertained and settled. A strong opposition, nevertheless, continued to be made to the exclusive money power of the House by those who disapproved of it on its merits; and when the article by which it was given in the reported draft prepared by the committee of detail was reached, it was stricken out by a very large vote of the states.<sup>2</sup> In this vote there was a concurrence of very opposite purposes on the part of the different states composing the majority. New Jersey, Delaware, and Maryland, for example, feeling secure of their equality in the Senate, were not unwilling to allow theoretical objections to prevail against the restriction of money bills to the branch in which they would necessarily be outnumbered. On the other hand, some of the delegates of Pennsylvania, Virginia, and South Carolina, still unwilling to acquiesce in the equality of representation in the Senate, may have hoped to unhinge the whole compromise. There was still a third party among the members, who insisted on maintaining the compromise in all its integrity, and who considered that the nature of the representation in the Senate, conceded to the wishes of the smaller states, rendered it eminently fit that the House alone should have the exclusive power to originate money bills.<sup>3</sup>

This party finally prevailed. They rested their first efforts chiefly upon the fact that the Senate was to represent the states in their political character. Although it might be proper to give such a body a negative upon the appropriations to be made by the

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<sup>1</sup> Elliot, V. 285. Ante, Chap. XXIV.

<sup>2</sup> August 8th. For striking out, New Jersey, Pennsylvania, Delaware, Maryland, Virginia, South Carolina, Georgia, *ay*, 7; New Hampshire, Massachusetts, Connecticut, North Carolina, *no*, 4.

<sup>3</sup> Dr. Franklin, Mason, Williamson, and Randolph. (Elliot, V. 395-397.) It would be endless to cite the observations of different members to show the purposes which they entertained. The reader who desires to test the accuracy of my inferences in any of these descriptions must study the debates, and compare, as I have done, the different *phases* which the subject assumed from time to time.

representatives of the people, it was not proper that it should tax the people. They first procured a reconsideration of the vote which had stricken out this part of the compromise. They then proposed, in order to avoid an alleged ambiguity, that bills for raising money for the purpose of *revenue*, or appropriating money, should originate in the House, and should not be so amended or altered in the Senate as to increase or diminish the sum to be raised, or change the mode of levying it, or the object of its appropriation.<sup>1</sup> An earnest and somewhat excited debate followed this proposition, but it was lost.<sup>2</sup>

In a day or two, however, another effort was made, conceding to the Senate the power to amend, as in other cases, but confining the right to the House of originating bills for raising money for the purpose of revenue, or for appropriating the same, and for fixing the salaries of officers of the government.<sup>3</sup>

This new proposition was postponed for a long time, until it became necessary to refer several topics not finally acted upon to a committee of one member from each state.<sup>4</sup> Among these subjects there was one that gave rise to protracted conflicts of opinion, which will be examined hereafter. It related to the mode of choosing the executive. In the plan reported by the committee of detail, pursuant to the instructions of the Convention, the executive was to be chosen by the national legislature, for a period of seven years, and was to be ineligible a second time. Great efforts were subsequently made to change both the mode of appointment and the tenure of the office, and the whole subject was finally referred with others to a committee. In this committee a new compromise, which has attracted but little attention, embraced the long-contested point concerning the origin of money bills. In this compromise, as in so many of the others on which the Constitution was founded, two influences are to be traced. There were in the first place what may be called the merits of a proposition, without regard to its bearing on the interests of particular states; and in the second place there were the local or state interests, which

<sup>1</sup> Moved by Randolph, August 13th. Elliot, V. 414.

<sup>2</sup> Ibid., 420.

<sup>3</sup> Moved by Mr. Strong, August 15th. Ibid., 427. This was brought forward as an amendment to the article (Art. VI. § 12) which was to define the powers of the two houses.

<sup>4</sup> August 31st. Elliot, V. 503.

entered into the treatment of every question by which they could be affected. In studying the compromises of the Constitution, it is constantly necessary to observe how the arrangement finally made was arrived at by the concurrence of votes given from these various motives.

It was now proposed in the new committee that the executive should be chosen by electors, appointed by each state in such manner as its legislature might direct, each state to have a number of electors equal to the whole number of its senators and representatives in Congress; that the person having the greatest number of votes, provided it were a majority of the electors, should be declared elected; that if there should be more than one having such a majority, the Senate should immediately choose one of them by ballot; and that if no person had a majority, the Senate should immediately choose by ballot from the five highest candidates on the list returned by the electors. This plan of vesting the election in the Senate, in case there should be no choice by the electors, was eagerly embraced by the smaller states, because it was calculated to restore to them the equilibrium which they would lose in the primary election, by the preponderance of votes held by the larger states. At the same time it gave to the larger states great influence in bringing forward the candidates from whom the ultimate choice must be made, when no choice had been effected by the electors; and it put it in their power, by a combination of their interests against those of the smaller states, to choose their candidate at the first election. To this great influence many members from the larger states desired, naturally, to add the privilege of confining the origin of revenue bills to the House of Representatives. They found in the committee some members from the smaller states willing to concede this privilege, as the price of an ultimate election of the executive by the Senate, and of other arrangements which tended to elevate the tone of the government by increasing the power and influence of the Senate. They found others also who approved of it upon principle. The compromise was accordingly effected in the committee, and in this attitude the question concerning revenue bills again came before the Convention.<sup>1</sup>

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<sup>1</sup> Elliot, V. 506, 510, 511, 514. The privilege, as it came from this committee,

But there, a scheme that seemed likely to elevate the Senate into a powerful oligarchy, and that would certainly put it in the power of seven states, not containing a third of the people, to elect the executive, when there failed to be a choice by the electors, met with strenuous resistance. For these and other reasons, not necessary to be recounted here, the ultimate choice of the executive was transferred from the Senate to the House of Representatives.<sup>1</sup> This change, if coupled with the concession of revenue bills to the House, without the right to amend in the Senate, would have thrown a large balance of power into the former assembly; and in order to prevent this inequality, a provision was made, in the words used in the Constitution of Massachusetts, that the Senate might propose or concur with amendments, as on other bills. With this addition, the restriction of the origin of bills for raising revenue to the House of Representatives finally passed, with but two dissentient votes.<sup>2</sup>

The qualifications of the senators had been made superior in some respects to those of the members of the House of Representatives, on account of the peculiar duties which it was intended they should discharge, and the length of their term of office. They were to be of the age of thirty years; to be inhabitants of the states for which they might be chosen; and in the report of the committee of detail the period of four years' citizenship was made one of the requirements. But so great was the jealousy of foreign influence, and so important was the position of a senator likely to become, that, when this particular qualification came to be considered, it was found to be altogether impossible to make so short a period of citizenship acceptable to a majority. According to the plan then contemplated, the Senate was to be a body of great power. Its legislative duties were to form but a part of its functions. It was to have the making of treaties, and the appointment of ambassadors and judges of the Supreme Court, without the concurrent action of any other department of the govern-

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was confined to "bills for raising revenue;" and these were made subject to "alterations and amendments by the Senate."

<sup>1</sup> Ibid., 519.

<sup>2</sup> The history of this provision shows clearly that a bill for appropriating money may originate in the Senate.

ment. In addition to these special powers it was to have a concurrent vote with the House of Representatives in the election of the executive. It was also to exercise the judicial function of hearing and determining questions of boundary between the states.

This formidable array of powers, which were subsequently much modified or entirely taken away, but which no one could then be sure would not be retained as they had been proposed, rendered it necessary to guard the Senate with peculiar care. A very animated discussion, in which the same reasons were urged on both sides which had entered into the debate on the qualifications of the representatives, enforced by the peculiar dangers to which the Senate might be exposed, at length resulted in a vote establishing the period of nine years' citizenship as a qualification for the office of a senator.<sup>1</sup>

The origin of the number of senators and of the method of voting forms an interesting and important topic, to which our inquiries should now be directed. We have already seen that, in the formation of the Virginia plan of government, as it was digested in the committee of the whole, the purpose was entertained, and was once sanctioned by a bare majority of the states, of giving to both branches of the legislature a proportional representation of the respective populations of the states; and that the sole difference between the two chambers then contemplated was to be in the mode of election. But in the actual situation of the different members of the Confederacy it was a necessary consequence of such a representation that the Senate would be made by it inconveniently large, whether the members were to be elected by the legislatures, the executives, or the people of the states. It would, in fact, have made the first Senate to consist of eighty or a hundred persons in order to have entitled the state of Delaware to a single member. This inconvenience was pointed out at an early period by Rufus King;<sup>2</sup> but it did not prevent the adoption of this mode of representation. On the one side of that long-contested question were those who desired to found the whole system of representation as between the states upon their relative numbers of inhabitants. On the other side were those who insisted

<sup>1</sup> August 9th. Elliot, V. 398-401. Massachusetts, Connecticut, Pennsylvania, and Maryland voted in the negative, and the vote of North Carolina was divided.

<sup>2</sup> May 31st. Elliot, V. 133.

upon an absolute equality between the states. But among the former there was a great difference of opinion as to the best mode of choosing the senators—whether they should be elected by the people in districts, by the legislatures or the executives of the states, or by the other branch of the national legislature. So strongly, however, were some of the members, even from the most populous states, impressed with the necessity of preserving the state governments in some connection with the national system, that, while they insisted on a proportional representation in the Senate, they were ready to concede to the state legislatures the choice of its members, leaving the difficulty arising from the magnitude of the body to be encountered as it might be.<sup>1</sup> The delegates of the smaller states accepted this concession, in the belief that the impracticability of constructing a convenient Senate in this mode would compel an abandonment of the principle of unequal representation, and would require the substitution of the equality for which they contended.

In this expectation they were not disappointed, for when the system framed in the committee came under revision in the Convention, and the severe and protracted contest ended at last in the compromise described in a previous chapter, the states were not only permitted to choose the members of the Senate, but they were admitted to an equality of representation in that branch, and the subject was freed from the embarrassment arising from the numbers that must have been introduced into it by the opposite plan. From this point the sole questions that required to be determined related to the number of members to be assigned to each state, and the method of voting. The first was a question of expediency only; the last was a question both of expediency and of principle.

The constant aim of the states which had from the first opposed a radical change in the structure of the government was to frame the legislature as nearly as possible upon the model of the Congress of the Confederation. In that assembly each state was allowed not more than seven and not less than two members; but in practice the delegations of the states perpetually varied between these two numbers or fell below the lowest, and in the

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<sup>1</sup> Dickinson, Gerry, Mason.



latter case the state was not considered as represented. The method of voting, however, rendered it unimportant how many members were present from a state, provided they were enough to cast the vote of the state at all; for all questions were decided by the votes of a majority of the states, and not of a majority of the members voting. I have already had occasion more than once to notice the fact—and it is one of no inconsiderable importance—that the first Continental Congress, assembled in 1774, adopted the plan of giving to each colony one vote, because it was impossible to ascertain the relative importance of the different colonies. The record that was then made of this reason for a method of voting that would have been otherwise essentially unjust shows quite clearly that a purpose was then entertained of adopting some other method at a future time. But when the Articles of Confederation were framed, in 1781, it appears as clearly from the discussions in Congress, not only that the same difficulty of obtaining the information necessary for a different system continued, but that some of the states were absolutely unwilling to enter the Confederation upon any other terms than a full federal equality. In this way the practice of voting by states in Congress was perpetuated down to the year 1787. It had come to be regarded by some of the smaller states, notwithstanding the injustice and inconvenience which it constantly produced, as a kind of birth-right; and when the Senate of the United States came to be framed, and an equality of representation in it was conceded, some of the members of those states still considered it necessary to preserve this method of voting in order to complete the idea of state representation, and to enable the states to protect their political rights.<sup>1</sup> But it is obvious that, for this purpose, the question had lost its real importance when an equal number of senators was assigned to each state; since, upon every measure that can touch the separate rights and interests of a state, the unanimity which is certain to prevail among its representatives makes the vote of the state as efficient as it could be if it were

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<sup>1</sup> Sherman, Luther Martin, Ellsworth. On the naked proposition, moved by Ellsworth, July 2d, to allow each state one vote in the Senate, Connecticut, New York, New Jersey, Delaware, Maryland, *ay*, 5; Massachusetts, Pennsylvania, Virginia, North Carolina, South Carolina, *no*, 5; Georgia divided.

required to be cast as a unit, while the chances for its protection are increased by the opportunity of gaining single votes from the delegations of other states.

These and similar considerations ultimately led a large majority of the states to prefer a union of the plan of an equal number of senators from each state with that which would allow them to vote *per capita*.<sup>1</sup> The number of two was adopted as the most convenient, under all the circumstances, because most likely to unite the despatch of business with the constant presence of an equal number from every state.

With this peculiar character the outline of the institution went to the committee of detail. On the consideration of their report these provisions, as we have seen, became complicated with the restriction of "money bills" to the House of Representatives and the choice of the executive. The mode in which those controversies were finally settled being elsewhere stated, it only remains here to record the fact that the particular nature and form of the representation in the Senate was generally acquiesced in, when its relations to the other branches of the government had been determined.

The difference of origin of the two branches of the legislature made it necessary to provide for different modes of supplying the vacancies that might occur in them. The obvious way of effecting this in the case of a vacancy in the office of a representative was to order a new election by the people, who can readily assemble for such a purpose; and the duty of ordering such elections was imposed on the executives of the states, because those functionaries would be best informed as to the convenience of their meeting. But the state legislatures, to whom the choice of senators was to be confided, would be in session for only a part of the year; and to summon them for the special purpose of filling a vacancy in the Senate might occasion great inconvenience. The committee of detail, therefore, provided that vacancies in the Senate might be supplied by the executive of the state until the next meeting of its legislature.

It is now time to turn to the examination of that great scheme of separate and concurrent powers which it had been proposed to confer upon the Senate, and the suggestion of which influenced to

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<sup>1</sup> Maryland alone voted against it.

a great degree the qualifications of the members, their term of office, and indeed the entire construction of this branch of the legislature. The primary purpose of a Senate was that of a second legislative chamber, having equal authority in all acts of legislation with the first, the action of both being necessary to the passage of a law. As the formation of the Constitution proceeded, from the single idea of such a second chamber, without any special character of representation to distinguish it from the first, up to the plan of an equal representation of the states, there was a strong disposition manifested to accumulate power in the body for which this peculiar character had been gained. It had been made the depositary of a direct and equal state influence; and this feature of the system had become fixed and irrevocable before the powers of the other departments, or their origin or relations, had been finally settled. The consequence was that, for a time, wherever jealousy was felt with regard to the executive or the judiciary—wherever there was a doubt about confiding in the direct action of the people—wherever a chasm presented itself, and the right mode of filling it did not occur—there was a tendency to resort to the Senate.

Thus, when the committee of detail were charged with the duty of preparing the Constitution according to the resolutions agreed upon in the Convention, the Senate had not only been made a legislative body, with authority co-ordinate to that of the House, but it had received the separate power of appointing the judges, and the power to give a separate vote in the election of the executive. The power to make war and treaties, the appointment of ambassadors, and the trial of impeachments had not been distinctly given to any department; but the general intention to be inferred from the resolutions was, that these matters should be vested in one or both of the two branches of the legislature. To the executive the duty had been assigned, which the name of the office implies, of executing the laws; to which had been added a revisionary check upon legislation, and the appointment to offices in cases not otherwise provided for. The judicial power had been described in general and comprehensive terms, which required a particular enumeration of the cases embraced by the principles laid down; but it had not been distinctly foreseen that one of the cases to which those principles must lead would be an alleged

conflict between an act of legislation and the fundamental law of the Constitution. The system thus marked out was carried into detail by the committee, by vesting in the Senate the power to make treaties, to appoint ambassadors and judges of the Supreme Court, and to adjudicate questions of boundary between the states; by giving to the two branches of the legislature the power to declare war; by assigning the trial of impeachments to the Supreme Court, and enumerating the other cases of which it was to have cognizance; and by providing for the election of the executive by the legislature, and confining its powers and duties to those prescribed for it by the resolutions.

It is scarcely necessary to pause for the purpose of commenting on the practical inconveniences of some of these arrangements. However proper it may be, in a limited and republican government, to vest the power of declaring war in the legislative department, the negotiation of treaties by a numerous body had been found, in our own experience and in that of other republics, extremely embarrassing. However wise may be a jealousy of the executive department, it is difficult to say that the same authority that is intrusted with the appointment to all other offices should not be permitted to make an ambassador or a judge. However august may be a proceeding that is to determine a boundary between sovereign states, it is nothing more and nothing less than a strictly judicial controversy, capable of trial in the ordinary forms and tribunals of judicature, besides being one that ought to be safely removed from all political influences. However necessary it may be that an impeachment should be conducted with the solemnities and safeguards of allegation and proof, it is not always to be decided by the rules with which judges are most familiar, or to be determined by that body of law which it is their special duty to administer. However desirable it may be that an elective chief magistracy should be filled with the highest capacity and fitness, and that popular tumults should be avoided, no government has yet existed in which the election of such a magistrate by the legislative department has afforded any decided advantage over an election directly or indirectly by the people; and to give a body constituted as the American Senate is a negative in the choice of the executive would be certainly inconvenient, probably dangerous.

But the position of the Senate as an assembly of the states, and certain opinions of its superior fitness for the discharge of some of these duties, had united to make it far too powerful for a safe and satisfactory operation of the government. It was found to be impossible to adjust the whole machine to the quantity of power that had been given to one of its parts. It was eminently just and necessary that the states should have an equal and direct representation in some branch of the government; but that a majority of the states, containing a minority of the people, should possess a negative in the appointment of the executive, and in the question of peace or war, and the sole voice in the appointment of judges and ambassadors, was neither necessary nor proper. Theoretically it might seem appropriate that a question of boundary between any two of the states represented in it should be committed to the Senate, as a court of the peers of the sovereign parties to the dispute; but practically this would be a tribunal not well fitted to try a purely judicial question. It became necessary, therefore, to discover the true limit of that control which the nature of the representation in the Senate was to be allowed to give to a majority of the states. There had been some effort, in the progress of the controversy respecting the representative system, to confine the equal power of the states, in matters of legislation, to particular questions or occasions; but it had turned out to be impracticable thus to divide or limit the ordinary legislative authority of the same body. If the Senate, as an equal assembly of the states, was to legislate at all, it must legislate upon all subjects by the same rule and method of suffrage. But when the question presented itself as to the separate action of this assembly—how far it should be invested with the appointment of other functionaries, how far it should control the relations of the country with foreign nations, how far it should partake both of executive and judicial powers—it was much less difficult to draw the line, and to establish proper limits to the direct agency of the states. Those limits could not indeed be ascertained by the mere application of theoretical principles. They were to be found in the primary necessity for reposing greater powers in other departments, for adjusting the relations of the system by a wider distribution of authority, and for confiding more and more in the intelligence and virtue of the people; and therefore it is that, in these

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as in other details of the Constitution, we are to look for the clew that is to give us the purpose and design, quite as much to the practical compromises which constantly took place between opposite interests, as to any triumph of any one of opposite theories.

The first experiment that was made towards a restriction of the power of the Senate, and an adjustment of its relations to the other departments, was the preparation of a plan by which the president was to have the making of treaties, and the appointment of ambassadors, judges of the Supreme Court, and all other officers not otherwise provided for, by and with the advice and consent of the Senate. The trial of impeachments, of the president included, was transferred to the Senate, and the trial of questions of boundary was placed, like other controversies between states, within the scope of the judicial power. The choice of the president was to be made in the first instance by electors appointed by each state, in such manner as its legislature might direct, each state to have a number of electors equal to the whole number of its senators and representatives in Congress; but if no one of the persons voted for should have a majority of all the electors, or if more than one person should have both a majority and an equal number of votes, the Senate were to choose the president from the five highest candidates voted for by the electors. In this plan there was certainly a considerable increase of the power of the president; but there was not a sufficient diminution of the power of the Senate. The president could nominate officers and negotiate treaties; but he must obtain the consent of the body by whom he might have been elected, and by whom his re-election might be determined, if he were again to become a candidate. It appeared, therefore, to be quite necessary, either to take away the revisionary control of the Senate over treaties and appointments, or to devise some mode by which the president could be made personally independent of that assembly. He could be made independent only by taking away all agency of the Senate in his election, or by making him ineligible to the office a second time. There were two serious objections to the last of these remedies—the country might lose the services of a faithful and experienced magistrate, whose continuance in office would be highly important; and even in a case where no pre-eminent merit had challenged a re-election, the effect of an election by the Senate would

always be pernicious, and must be visible throughout the whole term of the incumbent who had been successful over four other competitors.

And, after all, what necessity was there for confiding this vast power to the Senate, opening the door of a small body to the corruption and intrigue for which the magnitude of the prize to be gained and to be given, and the facility for their exercise, would furnish an enormous temptation? Was it so necessary that the states should force their equality of privilege and of power into every department of the Constitution, making it felt not only in all acts of legislation, but in the whole administration of the executive and judicial duties? Was nothing due to the virtue and sense and patriotism of a majority of the people of the United States? Might they not reasonably be expected to constitute a body of electors who, chosen for the express purpose, and dissolved as soon as their function had been discharged, would be able to make an upright and intelligent choice of a chief magistrate from among the eminent citizens of the Union?

Questions like these, posterity would easily believe without the clear record that has descended to them, must have anxiously and deeply employed the framers of the Constitution. They were to consider, not only what was theoretically fit and what would practically work with safety and success, but what would be accepted by the people for whom they were forming these great institutions. That people undoubtedly detested everything in the nature of a monarchy. But there was another thing which they hated with equal intensity, and that was an oligarchy. Their experience had given them quite as much reason for abhorring the one as the other. Such, at least, was their view of that experience. A king, it is true, was the chief magistrate of the mother country against which they had rebelled, against which they had fought successfully for their independence. The measures that drove them into that resistance were executed by the monarch; but those measures were planned, as they believed, by a ministry determined to enslave them, and were sanctioned by a Parliament in which even the so-called popular branch was then but another phase of the aristocracy which ruled the empire. The worst enemy our grandfathers supposed they had in England, throughout their Revolution, was the ministerial majority of that House of

Commons, made up of placemen sitting for rotten boroughs, the sons of peers, and the country gentlemen, who belonged to a caste as much as their first-cousins who sat by titles in the House of Lords. Our ancestors did not know—they went to their graves without knowing—that in the hard, implacable temper of the king, made harder and more implacable by a narrow and bigoted conscientiousness, was the real cause for the persistency in that fatal policy which severed these colonies from his crown.

That long struggle had been over for several years, and its result was certainly not to be regretted by the people of America. But it had left them, as it naturally must have left them, with as strong prejudices and jealousies against every aristocratic as against every monarchical institution. Public liberty in England they knew might consist with an hereditary throne, and with a privileged and powerful aristocracy. But public liberty in America could consist with neither. The people of the United States could submit to restraints; they could recognize the necessity for checks and balances in the distribution of authority; and they understood as much of the science of government as any people then alive. But an institution—however originating and however apparently necessary its peculiar construction might be—embracing but a small number of persons, with power to elect the chief magistrate, with power to revise every appointment from a chief justice down to a tidewaiter, with power to control the president through his subordinate agents, with power to reject every treaty that he might negotiate, and with power to sit in judgment on his impeachment, they would not endure. “We have, in some revolutions of this plan of government,” said Randolph, “made a bold stroke for monarchy. We are now doing the same for an aristocracy.”

How to attain the true intermediate ground, to avoid the substance of a monarchy and the substance of an aristocracy, and yet not to found the system on a mere democracy, was a problem not easy of solution. All could see that a government extended over a country so large, which was to have the regulation of its commerce, the collection of great revenues, the care of a vast public domain, the superintendence of intercourse with hordes of savage tribes, the control of relations with all the nations of the world, the administration of a peculiar jurisprudence, and the protection



of the local constitutions from violence, must have an army and a navy, and great fiscal, administrative, and judicial establishments, embracing a very numerous body of public officers. To give the appointment of such a multitude of public servants, invested with such functions, to the unchecked authority of the president, would be to create an executive with power not less formidable and real than that of some monarchs, and far greater than that of others. No one desired that a sole power of appointment should be vested in the president alone; it was universally conceded that there must be a revisionary control lodged somewhere, and the only question was where it should be placed. That it ought to be in a body independent of the executive, and not in any council of ministers that might be assigned to him, was apparent; and there was no such body, excepting the Senate, which united the necessary independence with the other qualities needful for a right exercise of this power.

The negotiation of treaties was obviously a function that should be committed to the executive alone. But a treaty might undertake to dismember a state of part of its territory, or might otherwise affect its individual interests; and even where it concerned only the general interests of all the states, there was a great unwillingness to intrust the treaty-making power exclusively to the president. Here the states, as equal political sovereignties, were unwilling to relax their hold upon the general government; and the result was that provision of the Constitution which makes the consent of two thirds of the Senators present necessary to the ratification of a treaty.

But if it was to have these great overruling powers, the Senate must have no voice in the appointment of the executive. There were two modes in which the election might be arranged, so as to prevent a mutual connection and influence between the Senate and the president. The one was, to allow the highest number of electoral votes to appoint the president;<sup>1</sup> the other was, to place the eventual election—no person having received a majority of all the electoral votes—in the House of Representatives. The latter plan was finally adopted, and the Senate was thus effectually severed from a dangerous connection with the executive.

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<sup>1</sup> This suggestion was made by Hamilton. Elliot, V. 517.

This separation having been effected, the objections which had been urged against the length of the senatorial term became of little consequence. In the preparation of the plan marked out in the resolutions sent to the committee of detail, the Senate had been considered chiefly with reference to its legislative function; and the purpose of those who advocated a long term of office was to establish a body in the government of sufficient wisdom and firmness to interpose against the impetuous counsels and levelling tendencies of the democratic branch.<sup>1</sup> Six years was adopted as an intermediate period between the longest and the shortest of the terms proposed; and in order that there might be an infusion of different views and tendencies from time to time, it was provided that one third of the members should go out of office biennially.<sup>2</sup> Still, in the case of each individual senator, the period of six years was the longest of the limited terms of office created by the Constitution. Under the Confederation the members of the Congress had been chosen annually, and were always liable to recall. The people of the United States were in general strongly disposed to a frequency of elections. A term of office for six years would be that feature of the proposed Senate most likely, in the popular mind, to be regarded as of an aristocratic tendency. If united with the powers that have just passed under our review, and if to those powers it could be said that an improper influence over the executive had been added, the system would in all probability be rejected by the people. But if the Senate were deprived of all agency in the appointment of the president it would be mere declamation to complain of their term of office; for undoubtedly the peculiar duties assigned to the Senate could be best discharged by those who had had the longest experience in them. The solid objection to such a term being removed, the complaint of aristocratic tendencies would be confined to those who might wish to find plausible reasons for opposition, and might not wish to be satisfied with the true reasons for the provision.

Having now described the formation and the special powers of the two branches of the legislature, I proceed to inquire into the origin and history of the disqualifications to which the members were subjected.

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<sup>1</sup> Madison, Hamilton, Wilson, and Read. Elliot, V. 241-245. June 26th.

<sup>2</sup> Ibid.

The Constitution of the United States was framed and established by a generation of men who had observed the operation upon the English legislature of that species of influence, by the crown or its servants, which, from the mode of its exercise, not seldom amounting to actual bribery, has received the appropriate name of parliamentary corruption. That generation of the American people knew but little—they cared less—about the origin of a method of governing the legislative body which implies an open or a secret venality on the part of its members, and a willingness on the part of the administration to purchase their consent to its measures. What they did know and what they did regard was, that for a long succession of years the votes of members of Parliament had been bought, with money or office, by nearly every minister who had been at the head of affairs; that, if this practice had not been introduced under the prince who was placed upon the throne by the revolution of 1688, it had certainly grown to a kind of system in the hands of the statesmen by whom that revolution was effected, and had attained its greatest height under the first two princes of the house of Hanover; that it was freely and sometimes shamefully applied throughout the American war; and that, down to that day, no British statesman had had the sagacity to discover, and the virtue to adopt, a purer system of administration.<sup>1</sup> Whether this was a necessary vice of the English constitution; whether it was inherent or temporary; or whether it was only a stage in the development of parliamentary government, destined to pass away when the relations of the representative body to the people had become better settled—could not then be seen even in England. But to our ancestors, when framing their Constitution,

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<sup>1</sup> In Horace Walpole's *Memoirs of the Reign of George II.* there is an amusing parallel—gravely drawn, however—between the mode in which his father, Sir Robert, “traded for members,” and the manner in which Mr. Pelham carried on *his* corruption. Lord Mahon has called Sir Robert Walpole “the patron and parent of parliamentary corruption.” (*Hist. of England*, I. 268.) But both Mr. Hallam and Mr. Macaulay say that it originated under Charles II., and both admit that it was practised down to the close of the American war. (Hallam's *Const. Hist.*, III. 255, 256, 351–356; Macaulay's *Hist. of England*, III. 541–549.) The latter, in a very masterly analysis of its origin and history, treats it as a local disease, incident to the growth of the English constitution. It must be confessed that it had become *chronic*.

it presented itself as a momentous fact, whose warning was not the less powerful because it came from the centre of institutions with which they had been most familiar, and from the country to which they traced their origin—a country in which parliamentary government had had the fairest chances for success that the world had witnessed.

Yet it would not have been easy at that time, as it is not at the present, and as it may never be, to define with absolute precision the true limits which executive influence with the legislative body should not be suffered to pass. Still less is it easy to say that such influence ought not to exist at all;<sup>1</sup> although it is not difficult to say that there are methods in which it should not be suffered to be exercised. The more elevated and more clear-sighted public morality of the present age, in England and in America, condemns with equal severity and equal justice both the giver and the receiver in every transaction that can be regarded as a purchase of votes upon particular measures or occasions, whatever may have been the consideration or motive of the bargain. But whether that morality goes, or ought to go, further—whether it includes, or ought to include, in the same condemnation, every form of influence by which an administration can add extrinsic weight to the merits of its measures—is a question that admits of discussion.

It may be said, assuming the good intentions of an administration and the correctness of its policy and measures, that its policy and its measures should address themselves solely to the patriotism and sense of right of the members of the legislative department.

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<sup>1</sup> I am quite aware of the danger of reasoning from the circumstances of one country to those of another, even in the case of England and the United States. But I avail myself, in support of the text, of the authority of a writer whose high moral tone and whose profound knowledge of the Constitution on which he has written unite to make it unnecessary that its history should be written again; I mean, of course, Mr. Hallam. He pronounces it an extreme supposition, and not to be pretended, that Parliament was ever “absolutely, and in all conceivable circumstances, under the control of the sovereign, whether through intimidation or corrupt subservience.” “But,” he adds, “as it would equally contradict notorious truth to assert that every vote has been disinterested and independent, *the degree of influence which ought to be permitted, or which has at any time existed, becomes one of the most important subjects in our constitutional policy.*” Const. Hist., III. 351.

But an ever-active patriotism and a never-failing sense of right are not always, if often, to be found ; the members of a legislative body are men, with the imperfections, the failings, and the passions of men, and if pure patriotism and right perceptions of duty are alone relied upon, they may, and sometimes inevitably will, be found wanting. On the other hand, it is just as true that the persons composing every administration are mere men, and that it will not do to assume their wisdom and good intentions as the sole foundations on which to rest the public security, leaving them at liberty to use all the appliances that may be found effectual for gaining right ends, and overlooking the character of the means. One of the principal reasons for the establishment of different departments in the class of governments to which ours belongs is, that perfect virtue and unerring wisdom are not to be predicated of any man in any station. If they were, a simple despotism would be the best and the only necessary form of government.

All correct reasoning on this subject, and all true construction of governments like ours, must commence with two propositions, one of which embraces a truth of political science, and the other a truth of general morals. The first is that, while the different functions of government are to be distributed among different persons, and to be kept distinctly separated, in order that there may be both division of labor and checks against the abuse of power, it is occasionally necessary that some room should be allowed for supplying the want of wisdom or virtue in one department by the wisdom or virtue of another. In matters of government depending on mere discretion, unlimited confidence cannot with safety be placed anywhere.<sup>1</sup> The other proposition is

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<sup>1</sup> The position and functions of the judiciary, after proper measures have been taken to secure individual capacity and integrity, do admit and require what may be called absolute confidence. That is to say, their action is not only final and conclusive, but it is never legitimately open to the influence of any other department. The reason is, that their action does not proceed from individual discretion, but is regulated by the principles of a moral science, whose existence is wholly independent of the will of the particular judge. Whereas the action of both the executive and the legislative departments, within the limits prescribed to it by the fundamental law, involves the exercise, to a wide extent, of mere individual discretion. The remedy for a failure in the judge to justify the confidence reposed in him is, therefore, only by impeachment.

the very plain axiom in morals that, while in all human transactions there may be bad means employed to effect a worthy object, the character of those means can never be altered, nor their use justified, by the character of the end. With these two propositions admitted, what is to be done is to discover that arrangement of the powers and relations of the different departments whose acts involve, more or less, the exercise of pure discretion, which will give the best effect to both of these truths; and as all government and all details of government, to be useful, must be practically adapted to the nature of man, it will be found that an approximation in practice to a perfect theory is all that can be attained.

Thus the general duties and powers of the legislative and the executive departments are capable of distinct separation. The one is to make, the other is to execute, the laws. But execution of the laws of necessity involves administration, and administration makes it necessary that there should be an executive policy. To carry out that policy requires new laws; authority must be obtained to do acts not before authorized; and supplies must be perpetually renewed. The executive stands, therefore, in a close relation to the legislative department—a relation which makes it necessary for the one to appeal frequently, and indeed constantly, to the discretion of the other. If the executive is left at liberty to purchase what it believes or alleges to be the right exercise of that discretion, by the inducements of money or office applied to a particular case, the rule of common morals is violated, conscience becomes false to duty, and corruption, having once entered the body politic, may be employed to effect bad ends as well as good. Nay, as bad ends will stand most in need of its influence, it will be applied the most grossly where the object to be attained is the most culpable. On the other hand, if the members of the legislative body, by being made incapable of accepting the higher or more lucrative offices of state, are cut off from those inducements to right conduct and a true ambition which the imperfections of our nature have made not only powerful, but sometimes necessary aids to virtue, the public service may have no other security than their uncertain impulses or imperfect judgments. In the midst of such tendencies to opposite mischiefs, all that human wisdom and foresight can do is to anticipate and prevent the evils of

both extremes by provisions which will guard both the interests of morality and the interests of political expediency as completely as circumstances will allow.

I am persuaded it was upon such principles as I have thus endeavored to state that the framers of our national Constitution intended to regulate this very difficult part of the relations between the executive and the legislature. During a considerable period, however, of their deliberations on the disabilities to which it would be proper to subject the members of the latter department, they had another example before them besides that afforded by the history of parliamentary corruption in England. The Congress of the Confederation had the sole power of appointment to offices under the authority of the United States; and although there is no reason to suppose that body at any time to have been justly chargeable with corrupt motives, there were complaints of the frequency with which it had filled the offices which it had created with its own members. In these complaints the people overlooked the justification. They forgot that the nature of the government and the circumstances of the country rendered it difficult for an assembly which both made and filled the offices, and which exercised its functions at a time when the state governments absorbed by far the greater part of the interests and attention of their citizens, to find suitable men out of its own ranks. In that condition of things it might have been expected—and it implies no improper purpose—that offices would be sometimes framed or regulated with a view to their being filled by particular persons. But the complaints existed; the evil was one that tended constantly to become worse; and, in framing the new government, this was the first aspect in which the influence of office and emoluments presented itself to the Convention.

For when the Virginia members, through Edmund Randolph,

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<sup>1</sup> The legislature of Massachusetts had, before Congress recommended the national Convention, instructed its delegates in Congress not to agree to any modification of the fifth Article of the Confederation, which prohibited the members of Congress from *holding* any office under the United States for which they or any other person for their benefit could receive any salary, fee, or emolument. This instruction was repealed by the unqualified manner in which the state accepted the recommendation for a national Convention. But it shows the sentiment of the state on this point, and it also shows the jealousy that was felt,

brought forward their scheme of government, they not only gave the executive no power of appointment to any office, but they proposed to vest the appointment of both the executive and the judiciary in the legislature. Hence they felt the necessity of guarding against the abuse that might follow if the members of the legislature were to be left at liberty to appoint each other to office—an abuse which they knew had been imputed to the Congress, and which they declared had been grossly practised by their own legislature.<sup>1</sup> They proposed, therefore, to go beyond the Confederation, and to make the members of both branches ineligible to any office established under the authority of the United States (excepting those peculiarly belonging to their own functions) during their term of service and for one year after its expiration. This provision passed the committee of the whole; but in the Convention, on a motion made by Mr. Gorham to strike it out, the votes of the states were divided. An effort was then made by Mr. Madison to find a middle ground between an eligibility in all cases and an absolute disqualification. If the unnecessary creation of offices and the increase of salaries was the principal evil to be anticipated, he believed that the door might be shut against that abuse, and might properly be left open for the appointment of members to places not affected by their own votes, as an encouragement to the legislative service. But there were several of the stern patriots of the Convention who insisted on a total exclusion, and who denied that there was any such necessity for holding out inducements to enter the legislature.<sup>2</sup> This was a question on which different minds, of equal sagacity and equal purity, would naturally arrive at different conclusions. Still, it is apparent that the mischiefs most apprehended at the time of Mr. Madison's proposition would be in a great degree prevented by taking from the legislature the power of appointing to office; and that this modification of the system was what was needed to make his plan a true remedy for the abuses that had been displayed in our own experience. The stigma of venality cannot properly be applied to the laudable ambition of rising into the honorable offices of a free government; and if the opportunity to create places, or to

<sup>1</sup> See the assertion by Mr. Mason, and the admission by Mr. Madison, Elliot, V. 230, 232.

<sup>2</sup> Butler, Mason, and Rutledge.



increase their emoluments, and then to secure those places, is taken away, by vesting the appointment in the executive, the question turns mainly on the relations that ought to exist between that department and the legislature. But Mr. Madison's suggestion was made before it was ascertained that the executive would have any power of appointment, and it was accordingly rejected—a majority of the delegations considering it best to retain the ineligibility in all cases, as proposed by the Virginia plan.<sup>1</sup> In this way the disqualification became incorporated into the first draft of the Constitution, prepared by the committee of detail.<sup>2</sup>

But by this time it was known that a large part of the patronage of the government must be placed in the hands of the president; for it had been settled that he was to appoint to all offices not otherwise provided for, and the cases thus excepted were those of judges and ambassadors, which stood, in this draft of the Constitution, vested in the Senate. A strong opposition to this arrangement, however, had already manifested itself, and the result was very likely to be—as it in fact turned out—that nearly the whole of the appointments would be made on the nomination of the president, even if the Senate were to be empowered to confirm or reject them. Accordingly, when this clause came under consideration, the principle of an absolute disqualification for office was vigorously attacked, and as vigorously defended. The inconvenience and impolicy of excluding officers of the army and navy from the legislature; of rendering it impossible for the executive to select a commander-in-chief from among the members, in cases of pre-eminent fitness; of refusing seats to the heads of executive departments; and of closing the legislature as an avenue to other branches of the public service—were all strenuously urged and denied.<sup>3</sup> At length a middle course became necessary, to reconcile all opinions. By a very close vote the ineligibility was restrained to cases in which the office had been created, or the emolument of

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<sup>1</sup> Two states only, Connecticut and New Jersey, voted for Madison's amendment. June 23d. Elliot, V. 230-233.

<sup>2</sup> The disqualification, as applied to members of both houses, was incorporated into one clause. Art. VI. § 9 of the draft of the committee of detail. Elliot, V. 377.

<sup>3</sup> See the debate, August 14th. Elliot, V. 420-425.

it increased, during the term of membership;' and a seat in the legislature was made incompatible with any other office under the United States.<sup>1</sup>

Some, at least, of the probable sources of corruption were cut off by these provisions. The executive can make no bargain for a vote, by the promise of an office which has been acted upon by the member whose vote is sought for; and there can be no body of placemen, ready at all times to sell their votes as the price for which they are permitted to retain their places. At the same time the executive is not deprived of the influence which attends the power of appointing to offices not created, or the emoluments of which have not been increased, by any Congress of which the person appointed has been a member. This influence is capable of abuse; it is also capable of being honorably and beneficially exerted. Whether it shall be employed corruptly or honestly, for good or for bad purposes, is left by the Constitution to the restraints of personal virtue and the chastisements of public opinion.

A serious question, however, has been made, whether the interests of the public service, involved in the relations of the two departments, would not have been placed upon a better footing if some of the higher officers of state had been admitted to hold seats in the legislature. Under the English Constitution there is no practical difficulty, at least in modern times, in determining the general principle that is to distinguish between the class of officers who can, and those who cannot, be usefully allowed to have seats in the House of Commons. The principle which, after much inconsistent legislation and many abortive attempts to legislate, has generally been acted on since the reign of George II., is, that it is both necessary and useful to have in that House some of the higher functionaries of the administration; but that it is not at all necessary, and not useful, to allow the privilege of sitting in Parliament to subordinate officers.<sup>2</sup> The necessity of the case arises altogether from the peculiar relations of the ministry

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<sup>1</sup> There was a majority of only one state in favor of this principle. Elliot, V. 506.

<sup>2</sup> This provision received a unanimous vote. Ibid.

<sup>3</sup> For the history of what have been called place-bills, see Hallam's Const. Hist., III. 255, 256, 351; Macaulay, IV. 336-338, 341, 342, 479, 480, 528.

to the crown, and of the latter to the Commons. If the executive government were not admitted, through any of its members, to explain and vindicate its measures, to advocate new grants of authority, or to defend the prerogatives of the crown, the popular branch of the legislature would either become the predominant power in the state, or sink into insignificance. This is conceded by the severest writers on the English government.

But when we pass from a civil polity which it has taken centuries to produce, and which has had its departments adjusted much less by reference to exact principles than by the results of their successive struggles for supremacy over each other, and when we come to an original distribution of powers, in the arrangements of a Constitution made entire and at once by a single act of the national will, we must not give too much effect to analogies which, after all, are far from being complete. In preparing the Constitution of the United States its framers had no prerogative in any way resembling that of the crown of England to consider and provide for. The separate powers to be conferred on the chief magistracy—aside from its concurrence in legislation—were simply executive and administrative; the office was to be elective, and not hereditary; and its functions, like those of the legislature, were to be prescribed with all the exactness of which a written instrument is capable. There was, therefore, little of such danger that the one department would silently or openly encroach on the rights or usurp the powers of the other, as there is where there exists hereditary right on the one side and customary right on the other, and where the boundaries between the two departments are to be traced by the aid of ancient traditions, or collected from numerous and perhaps conflicting precedents. There was no such necessity, therefore, as there is in England, for placing members of the administration in the legislature, in order to preserve the balance of the Constitution. The sole question with us was, whether the public convenience required that the administration should be able to act directly upon the course of legislation. The prevailing opinion was that this was not required. This opinion was undoubtedly formed under the fear of corruption and the jealousy of executive power, chiefly produced—and justly produced—by the example of what had long existed in England. That the error, if any was committed, lay on the safer side

none can doubt. It is possible that the chances of a corrupt influence would not have been increased, and that the opportunities for a salutary influence might have been enlarged—as it is highly probable that the convenience of communication would have been promoted—if some of the higher officers of state could have been allowed to hold seats in either house of Congress. But it is difficult to see how this could have been successfully practised under the system of representation and election which the framers of the Constitution were obliged to establish ; and perhaps this is a decisive answer to the objection.<sup>1</sup>

Among the powers conceded by the Constitution to the legislature of each state is that of prescribing the time, place, and manner of holding the elections of its senators and representatives in Congress. This provision<sup>2</sup> originated with the committee of detail ; but, as it was reported by them, there was no other authority reserved to Congress itself than that of altering the regulations of the states ; and this authority extended as well to the place of choosing the senators, as to all the other circumstances of the election.<sup>3</sup> In the Convention, however, the authority of Congress was extended beyond the alteration of state regulations, so as to embrace a power to make rules, as well as to alter those made by the states. But the place of choosing the senators was excepted altogether from this restraining authority, and left to the states.<sup>4</sup>

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<sup>1</sup> Mr. Justice Story has suggested that, “if it would not have been safe to trust the heads of departments, as representatives, to the choice of the people as their constituents, it would have been at least some gain to have allowed them a seat, like territorial delegates, in the House of Representatives, where they might freely debate without a title to vote.” (Commentaries on the Constitution, I. § 869.) An officer of an executive department, thus admitted to a seat in Congress, must have been placed there merely in virtue of his office, by a special provision. He could have represented no real constituency, and must therefore have had an anomalous position. A territorial delegate is admitted as the representative of a dependency, somewhat colonial in its nature, whose inhabitants are not on an equal footing with the constituencies of the states. He has, therefore, no vote. When speaking for the interests of those whom he represents, he is in somewhat the same attitude as counsel admitted to be heard at the bar of the House. Whether the head of an executive department could with dignity and convenience be placed in a similar position, admits at least of grave doubt.

<sup>2</sup> Art. I. § 4 of the Constitution.

<sup>3</sup> Art. VI. § 1 of the first draft.

<sup>4</sup> Madison, Elliot, V. 401, 402 ; Journal, Elliot, I. 809.

Mr. Madison, in his minutes, adds the explanation, that the power of Congress to *make* regulations was supplied, in order to enable them to regulate the elections, if the states should fail or refuse to do so.<sup>1</sup> But the text of the Constitution, as finally settled, gives authority to Congress "at any time" to "make or alter such regulations;" and this would seem to confer a power which, when exercised, must be paramount, whether a state regulation exists at the time or not.

There is one other peculiarity of the American legislature, of which it is proper in this connection to give a brief account: namely, the compensation of its members for their public services. In the plan presented by the Virginia delegation it was proposed that the members of both branches should receive "liberal stipends;" but it was not suggested whether they were to be paid by the states, or from the national treasury. The committee of the whole determined to adopt the latter mode of payment; and as the representation in both branches, according to the first decision, was to be of the same character, no reason was then suggested for making a difference in the source of their compensation. But when the construction of the Senate was considered in the Convention, the idea was suggested that this body ought in some way to represent wealth; and it was apparently under the influence of this suggestion that, after a refusal to provide for a payment of the senators by their states, payment out of the national treasury was stricken from the resolution under debate.<sup>2</sup> There was thus introduced into the resolution sent to the committee of detail a discrepancy between the modes of compensating the members of the two branches; for while the members of the House were to be paid "an adequate compensation" out of "the public treasury," the Senate were to receive "a compensation for the devotion of their time to the public service," but the source of payment was not designated. But when the whole body of those resolutions had been acted on, the character of the representation in the Senate had been settled, and the idea of its being made a representation of wealth, in any sense, had been rejected. The committee of detail had, therefore, in giving effect to the decisions of the Convention, to consider merely whether the members of the two

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<sup>1</sup> Elliot, V. 402.

<sup>2</sup> Elliot, V. 247.

branches should be paid by their states, or from the national treasury; and for the purpose of making the same provision as to both, and in order to avoid the question whether the Constitution should establish the amount, or should leave it to be regulated by the Congress itself, they provided that the members of each house should receive a compensation for their services, to be ascertained and paid by the state in which they should be chosen.<sup>1</sup>

This, however, was to encounter far greater evils than it avoided. If paid by their states the members of the national legislature would not only receive different compensations, but they would be directly subjected to the prejudices, caprices, and political purposes of the state legislatures. Whatever theory might be maintained with respect to the relations between the representatives, in either branch, and the state in which they were chosen, or the people of the states, to subject one class of public servants to the power of another class could not fail to produce the most mischievous consequences. A large majority of the states, therefore, decided upon payment out of the national treasury,<sup>2</sup> and it was finally determined that the rate of compensation should not be fixed by the Constitution, but should be left to be ascertained by law.<sup>3</sup>

Among the separate functions assigned by the Constitution to the houses of Congress are those of presenting and trying impeachments. An impeachment, in the report of the committee of detail, was treated as an ordinary judicial proceeding, and was placed within the jurisdiction of the Supreme Court. That this was not in all respects a suitable provision will appear from the following considerations. Although an impeachment may involve an inquiry whether a crime against any positive law has been committed, yet it is not necessarily a trial for crime; nor is there any necessity, in the case of crimes committed by public officers, for the institution of any special proceeding for the infliction of the punishment prescribed by the laws, since they, like all other persons, are amenable to the ordinary jurisdiction of the courts of justice in respect of offences against positive law. The purposes of an impeachment

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<sup>1</sup> Art. VI. § 10 of the first draft. Elliot, V. 378.

<sup>2</sup> Massachusetts and South Carolina in the negative.

<sup>3</sup> See the discussion on Art. VI. § 10 of the first draft. Elliot, V. 425-427.

lie wholly beyond the penalties of the statute or the customary law. The object of the proceeding is to ascertain whether cause exists for removing a public officer from office. Such a cause may be found in the fact that, either in the discharge of his office, or aside from its functions, he has violated a law, or committed what is technically denominated a crime. But a cause for removal from office may exist where no offence against positive law has been committed, as where the individual has, from immorality, or imbecility, or maladministration, become unfit to exercise the office. The rules by which an impeachment is to be determined are therefore peculiar, and are not fully embraced by those principles or provisions of law which courts of ordinary jurisdiction are required to administer.

From considerations of this kind, especially when applied to the impeachment of a president of the United States, the Convention found it expedient to place the trial in the Senate. In fact the whole subject of impeachments, as finally settled in the Constitution, received its impress in a great degree from the attention that was paid to the bearing of this power upon the executive. Few members of the Convention were willing to constitute a single executive, with such powers as were proposed to be given to the president, without subjecting him to removal from office on impeachment; and when it was perceived to be necessary to confer upon him the appointment of the judges, it became equally necessary to provide some other tribunal than the Supreme Court for the trial of his impeachment. There was no other body already provided for in the government with whom this jurisdiction could be lodged excepting the Senate; and the only alternative to this plan was to create a special tribunal for the sole purpose of trying impeachments of the president and other officers. This was justly deemed a manifest inconvenience; and although there were various theoretical objections suggested against placing the trial in the Senate, on the question being stated there were found to be but two dissentient states.<sup>1</sup> This point having been settled, in relation to impeachments of the president, the trial of impeachments of all other civil officers of the United States was, for the sake of uniformity, also confided to the Senate.<sup>2</sup> The power of impeach-

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<sup>1</sup> Pennsylvania and Virginia.

<sup>2</sup> See Elliot, V. 507, 528, 529.

ment was confined, as originally proposed, to the House of Representatives.<sup>1</sup>

The number of members of each house that should be made a *quorum* for the transaction of business gave rise to a good deal of difference of opinion. The controlling reason why a smaller number than a majority of the members of each house should not be permitted to make laws was to be found in the extent of the country and the diversity of its interests. The central states, it was said, could always have their members present with more convenience than the distant states; and, after some discussion, it was determined to establish a majority of each house as its *quorum* for the transaction of business, giving to a smaller number power to adjourn from day to day, and to compel the attendance of absent members.<sup>2</sup>

Provisions making each house the judge of the elections, returns, and qualifications of its own members; that for any speech or debate in either house no member shall be questioned in any other place; and that in all cases except treason, felony, or breach of the peace, the members shall be privileged from arrest during their attendance at, and in going to and returning from, the sessions of their respective houses—were agreed to without any dissent.<sup>3</sup>

The power of each house to determine the rules of its proceedings, to punish its members for disorderly behavior, and to expel with the concurrence of two thirds, was agreed to with general assent.<sup>4</sup> Each house was also directed to keep a journal of its proceedings, and from time to time to publish the same, excepting such parts as may in their judgment require secrecy; and one fifth of the members present in either house were empowered to require the yeas and nays to be entered on its journal.<sup>5</sup>

The report of the committee of detail had made no provision for such an officer as the Vice-President of the United States, and had therefore declared that the Senate, as well as the House, should

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<sup>1</sup> As to the other provisions of the Constitution on this subject, see the Index, *verb.* Impeachment.

<sup>2</sup> Elliot, V. 405, 406. Art. I. § 5 of the Constitution.

<sup>3</sup> Elliot, V. 406. Constitution, Art. I. §§ 5, 6.

<sup>4</sup> Elliot, V. 407. Constitution, Art. I. § 5.

<sup>5</sup> *Ibid.*



choose its own presiding officer. This feature of their report received the sanction of the Convention ; but subsequently, when it became necessary to create an officer to succeed the President of the United States in case of death, resignation, or removal from office, the plan was adopted of making the former *ex officio* the presiding officer of the Senate, giving him a vote only in cases where the votes of the members are equally divided.<sup>1</sup> To this was added the further provision, that the Senate shall choose, besides all its other officers, a president *pro tempore*, in the absence of the vice-president, or when he shall exercise the office of President of the United States.<sup>2</sup> The House of Representatives were empowered to choose their own speaker, and other officers, as originally proposed.<sup>3</sup>

The mode in which laws were to be enacted was the last topic concerning the action of the legislature which required to be dealt with in the Constitution. The principle had been already settled that the negative of the president should arrest the passage of a law, unless, after he had refused his concurrence, it should be passed by two thirds of the members of each house. In order to give effect to this principle, the committee of detail made the following regulations, which were adopted into the Constitution : That every bill which shall have passed the two houses, shall, before it become a law, be presented to the President of the United States ; that if he approve he shall sign it, but if not he shall return it, with his objections, to the house in which it originated, who shall enter the objections at large on their journal, and proceed to reconsider it ; that if, after such reconsideration, two thirds of that house agree to pass the bill, it is to be sent with the objections to the other house, by which it is likewise to be reconsidered, and, if approved by two thirds of that house, it is to become a law ; but in all such cases the votes of both houses are to be determined by yeas and nays entered upon the journal. If any bill be not returned by the president within ten days (Sundays excepted) after it has been presented to him, it is to become a law in like manner as if he had signed it, unless the Congress by adjourning prevent its return, in which case it is not to become a law. All orders, resolutions, and votes to which the concurrence of both houses is

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<sup>1</sup> Elliot, V. 507, 520. Constitution, Art. I. § 3.

<sup>2</sup> Ibid.

<sup>3</sup> Art. I. § 2.

necessary (except on a question of adjournment), are subject to these provisions.<sup>1</sup>

The two important differences between the negative thus vested in the President of the United States and that which belongs to the King of England are, that the former is a qualified, while the latter is an absolute, power to arrest the passage of a law; and that the one is required to render to the legislature the reasons for his refusal to approve a bill, while the latter renders no reasons, but simply answers that he will advise of the matter, which is the parliamentary form of signifying a refusal to approve. The provision in our Constitution which requires the president to communicate to the legislature his objections to a bill was rendered necessary by the power conferred upon two thirds of both houses to make it a law, notwithstanding his refusal to sign it. By this power, which makes the negative of the president a qualified one only, the framers of the Constitution intended that the two houses should take into consideration the objections which may have led the president to withhold his assent, and that his assent should be dispensed with, if, notwithstanding those objections, two thirds of both houses should still approve of the measure. These provisions, therefore, on the one hand, give to the president a real participation in acts of legislation, and impose upon him a real responsibility for the measures to which he gives his official approval, while they give him an important influence over the final action of the legislature upon those which he refuses to sanction; and, on the other hand, they establish a wide distinction between his negative and that of the king in England. The latter has none but an absolute "veto;" if he refuse to sign a bill it cannot become a law; and it is well understood that it is on account of this absolute effect of the refusal that this prerogative has been wholly disused since the reign of William III., and that the practice has grown up of signifying, through the ministry, the previous opposition of the executive, if any exists, while the measure is under discussion in Parliament. It is not needful to consider here which mode of legislation is theoretically or practically the best. It is sufficient to notice the fact that the absence from our system of official and responsible advisers of the president having seats in the legislature

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<sup>1</sup> Constitution, Art. I. § 7.

renders it impracticable to signify his views of a measure, while it is under the consideration of either house. For this reason, and because the president himself is responsible to the people for his official acts, and in order to accompany that responsibility with the requisite power both to act upon reasons and to render them, our Constitution has vested in him this peculiar and qualified negative.<sup>1</sup>

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<sup>1</sup> A question has been made, whether it is competent to two thirds of the members *present* in each house to pass a bill notwithstanding the president's objections, or whether the Constitution means that it shall be passed by two thirds of all the members of each branch of the legislature. The history of the "veto" in the Convention seems to me to settle this question. There was a change of phraseology, in the course of the proceedings on this subject, which indicates very clearly a change of intention. The language employed in the resolutions, in all the stages through which they passed, was, that "The national executive shall have a right to negative any legislative act, which shall not be afterwards passed by *two-third parts of each branch of the national legislature*." This was the form of expression contained in the resolutions sent to the committee of detail; and if it had been incorporated into the Constitution there could have been no question but that its meaning would have been that the bill must be afterwards passed by two thirds of all the members to which each branch is constitutionally entitled. But the committee of detail changed this expression, and employed one which has a technical meaning, that meaning being made technical by the Constitution itself. Before the committee came to carry out the resolution relating to the president's negative, they had occasion to define what should constitute a "*house*" in each branch of the legislature; and they did so by the provision that a majority of each *house* shall constitute a quorum to do business. This expression, a "*house*," or "*each house*," is several times employed in the Constitution with reference to the faculties and powers of the two chambers respectively, and it always means, when so used, the constitutional quorum, assembled for the transaction of business, and capable of transacting business. This same expression was employed by the committee when they provided for the mode in which a bill, once rejected by the president, should be again brought before the legislative bodies. They directed it to be returned "*to that house in which it shall have originated*"—that is to say, to a constitutional quorum, a majority of which passed it in the first instance; and they then provided, that, if "*two thirds of that house* shall agree to pass the bill, it shall be sent, together with the objections, to the other *house*, . . . and if approved by *two thirds of that house*, it shall become a law." This change of phraseology, taken in connection with the obvious meaning of the term "*house*," as used in the Constitution when it speaks of a chamber competent to do business, shows the intention very clearly. It is a very different provision from what would have existed if the phrase "*two-third parts of each branch of the national legislature*" had been retained. See Elliot, V. 349, 376, 378, 431, 536.

The remaining topic that demands our inquiries, respecting the legislature, relates to the place of its meeting. The Confederation was a government without a capitol, or a seat; a want which seriously impaired its dignity and its efficiency, and subjected it to great inconveniences; at the same time, it was unable to supply the defect. Its Congress, following the example of their predecessors, had continued to assemble at Philadelphia,

This view will be sustained by an examination of all the instances in which the votes of "two thirds" in either body are required. Thus, "each house may determine the rules of its proceedings, punish its members for disorderly behavior, and, *with the concurrence of two thirds*, expel a member." (Art. I. § 5.) The context of the same article defines what is to constitute a "house," and makes it clear that two thirds of a "house" may expel. That this was the intention is also clear from what took place in the Convention. Mr. Madison objected to the provision as it stood on the report of the committee, by which a mere *majority* of a quorum was empowered to expel, and, on his motion, the words "with the concurrence of two thirds" were inserted. (Elliot, V. 406, 407.) In like manner the fifth Article of the Constitution empowers Congress, "*whenever two thirds of both HOUSES shall deem it necessary*," to propose amendments to the Constitution. The term "house" is here used as synonymous with a quorum.

It has been suggested, however, that the use of a positive expression in relation to the action of the Senate upon treaties throws some doubt upon the meaning of the term "two thirds," as used in other parts of the Constitution. A treaty requires the concurrence of "two thirds of the senators *present*," and it has been argued that the omission of this term in the other cases shows that two thirds of all the members are required in those cases. But it is to be remembered that the Constitution makes a general provision as to what shall constitute a house for the transaction of business; that when it means that a particular function shall not be performed by such a house, or quorum, it establishes the exception by a particular provision, as when it requires two thirds of all the states to be present in the House of Representatives on the choice of a president, and makes a majority of all the states necessary to a choice; and that whether the function of the Senate in approving treaties is or is not a part of the business which under the general provision is required to be done in a "house" or quorum consisting of a majority of all the members, the Constitution does not speak of this function as being done by a "house," but it speaks of the "advice and consent of the *Senate*," to be given "by two thirds of the senators *present*." The use of the term "present" was necessary, therefore, in this connection, because no term had preceded it which would guide the construction to the conclusion intended; but in the other cases, the previous use of the term "house," defined to be a majority of all the members, determines the sense in which the term "two thirds" is to be understood, and makes it, as I humbly conceive, two thirds of a constitutional quorum.

until June, 1783; when, as we have already seen, in consequence of a mutiny by some of the federal troops stationed in that neighborhood, against which the local authorities failed to protect them, they left that city, and reassembled at Princeton, in the state of New Jersey, in the halls of a college. There, in the following October, a resolution was passed, directing that buildings for the use of Congress should be erected at some suitable place near the Falls of the Delaware; for which the right of soil and an exclusive jurisdiction should be obtained.<sup>1</sup> But this was entirely unsatisfactory to the Southern States. They complained that the place selected was not central, was unfavorable to the Union, and unjust to them. They endeavored to procure a reconsideration of the vote, but without success.<sup>2</sup> Several days were then consumed in fruitless efforts to agree on a temporary residence; and at length it became apparent that there was no prospect of a general assent to any one place, either for a temporary or for a permanent seat. The plan of a single residence was then changed, and a resolution was passed, providing for an alternate residence at two places, by directing that buildings for the use of Congress, and a federal town, should also be erected at or near the lower falls of the Potomac, or Georgetown; and that until both places, that on the Delaware and that on the Potomac, were ready for their reception, Congress should sit alternately, for equal periods of not more than one year and not less than six months, at Trenton, the capital of the state of New Jersey, and at Annapolis, the capital of the state of Maryland. The president was thereupon directed to adjourn the Congress, on the 12th of the following November, to meet at Annapolis on the 26th, for the despatch of business. Thither they accordingly repaired, and there they continued to sit until June 3, 1784. A recess followed, during which a committee of the states sat, until Congress reassembled at Trenton, on the 30th of the following October.

At Trenton the accommodations appear to have been altogether insufficient, and the states of South Carolina and Pennsylvania proposed to adjourn from that place.<sup>3</sup> The plan of two

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<sup>1</sup> October 6th, 1783, Journals, VIII. 423.

<sup>2</sup> October 8th. Ibid., 424, 425.

<sup>3</sup> December 10th, 11th, 1784. Journals, X. 16-18.

capitols in different places was then rescinded,<sup>1</sup> and an ordinance was passed for the appointment of commissioners to establish a seat of government on the banks of the Delaware, at some point within eight miles above or below the lower falls of that river. Until the necessary buildings should be ready for their reception, the ordinance provided that Congress should sit at the city of New York.<sup>2</sup> When assembled there in January, 1785, they received and accepted from the corporation an offer of the use of the City Hall; and in that building they continued to hold their sessions until after the adoption of the Constitution.<sup>3</sup>

It does not appear that any steps were taken under the ordinance of 1784, or under any of the previous resolutions, for the establishment of a federal town and a seat of government at any of the places designated. Whether the Congress felt the want of constitutional power to carry out their project, or whether the want of means, or a difficulty in obtaining a suitable grant of the soil and jurisdiction, was the real impediment, there are now no means of determining. It seems quite probable, however, that, after their removal to the city of New York, they found themselves much better placed than they or their predecessors had ever been elsewhere; and as the discussions respecting a total revision of the federal system soon afterwards began to agitate the public mind, the plan of establishing a seat for the accommodation of the old government was naturally postponed.

The plan itself, on paper, was a bold and magnificent one. It contemplated a district not less than two and not more than three miles square, with a "federal house" for the use of Congress; suitable buildings for the executive departments; official residences for the president and secretary of Congress, and the secretaries of foreign affairs, of war, of the marine, and the officers of the treasury; besides hotels to be erected and owned by the states as residences for their delegates. But for this fine scheme of a federal metropolis an appropriation was made which, even in those days, one might suppose, would scarcely have paid for the land required. The commissioners who were to purchase

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<sup>1</sup> December 20th, 21st. Ibid., 23, 24.    <sup>2</sup> Passed December 23d. Ibid., 29.

<sup>3</sup> They removed from it October 2d, 1788, on a notice from the mayor of the city that repairs were to be made.

the site, lay out the town, and contract for the erection and completion of all the public edifices—excepting those which were to belong to the states—“in an elegant manner,” were authorized to draw on the federal treasury for a sum not exceeding one hundred thousand dollars, for the whole of these purposes. If we are to understand it to have been really expected and intended that this sum should defray the cost of this undertaking, we must either be amused by the modest requirements of the Union at that day, or stand amazed at the strides it has since taken in its onward career of prosperity and power.

In truth, however, there is not much reason to suppose that the Congress of the Confederation seriously contemplated the establishment of a federal city. They were too feeble for such an undertaking. They could pass resolutions and ordinances for the purpose, and send them to the authorities of the states—and if a more decent attention to the wants and dignity of the federal body was excited, it was well, and was probably the effect principally intended. If they had actually proceeded to do what their resolution of 1783 proposed—to acquire the jurisdiction, as well as the right of soil, over a tract of land—they must have encountered a serious obstacle in the want of constitutional power. This difficulty seems to have been felt at a later period; for the ordinance of 1784 only directs a purchase of the land, and is silent upon the subject of municipal jurisdiction. It is fortunate, too, on all accounts, that the design was never executed, if it was seriously entertained. The presence of Congress in the city of New York, where the legislature of the state was also sitting, in the winter of 1787, enabled Hamilton to carry those measures in both bodies which led immediately to the summoning of the national Convention. And it was especially fortunate that this whole subject came before the Convention unembarrassed with a previous choice of place by the old Congress, or with any steps concerning municipal jurisdiction which they might have taken, or omitted.

For it was no easy matter, in the temper of the public mind existing from 1783 to 1788, to determine where the seat of the confederated, or that of the national, government ought to be placed. The Convention found this an unsettled question, and they wisely determined to leave it so. The cities of New York and Phila-

delphia had wishes and expectations, and it was quite expedient that the Constitution should neither decide between them nor decide against both of them. It was equally important that it should not direct whether the seat of the national government should be placed at any of the other commercial cities, or at the capital, or within the jurisdiction of any state, or in a district to be exclusively under the jurisdiction of the United States. These were grave questions, which involved the general interests of the Union; but, however settled, they would cost the Constitution, in some quarter or other, a great deal of the support that it required, if determined before it went into operation.<sup>1</sup> Temporarily, however, the new government must be placed somewhere within the limits of a state, and at one of the principal cities; and as the Congress then sitting at New York would probably invite their successors to assemble there, it became necessary to provide for a future removal, when the time should arrive for a general agreement on the various and delicate questions involved. The difference of structure, however, between the two branches of the proposed Congress, and the difference of interests that might predominate in each, made a disagreement on these questions probable, if not inevitable; and a disagreement on the place of their future sessions, if accompanied by power to sit in separate places, would be fatal to the peace of the Union and the operation of the government.

The committee of detail, therefore, inserted in their draft a clause prohibiting either house, without the consent of the other, from adjourning for more than three days, or to any other place than that at which the Congress might be sitting. Mr. King expressed an apprehension that this implied an authority in both houses to adjourn to any place; and, as a frequent change of place had dishonored the federal government, he thought that a law, at least, should be made necessary for a removal. Mr. Madison considered a central position would be so necessary, and that it would be so strongly demanded by the House of Representatives, that a removal from the place of their first session would be extorted, even if a law were required for it. But there was a fear that, if the government were once established at the city of New

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<sup>1</sup> See the conversation reported by Madison, Elliot, V. 374.



York, it would never be removed if a law were made necessary. The provision reported by the committee was, therefore, retained, and it was left in the power of the two houses alone, during a session of Congress, to adjourn to any place, or to any time, on which they might agree.<sup>1</sup>

Still it was needful that the Constitution should empower the legislature to establish a seat of government out of the jurisdiction of any of the states, and away from any of their cities. The time might come when this question could be satisfactorily met. The time would certainly come when the people of the whole Union could see that the dignity, the independence, and the purity of the government would require that it should be under no local influences; when every citizen of the United States, called to take part in the functions of that government, ought to be able to feel that he and his would owe their protection to no power save that of the Union itself. Some disadvantage, doubtless, might be experienced in placing the government away from the great centres of commerce. But neither of the principal seats of wealth and refinement was very near to the centre of the Union; and if either of them had been, the necessity for an exclusive local jurisdiction would probably be found, after the adoption of the Constitution, to outweigh all other considerations. Accordingly, when the Constitution was revised for the purpose of supplying the needful provisions omitted in its preparation, it was determined that no peremptory direction on the subject of a seat of government should be given to the legislature; but that power should be conferred on Congress to exercise an exclusive legislation, in all cases, over such district, not exceeding ten miles square, as might, by cession of particular states and the acceptance of Congress, become the seat of government of the United States. This provision has made the Congress of the United States the exclusive ruler of the District of Columbia, which it governs in its capacity of the legislature of the Union. It enabled Washington to found the city which bears his name; towards which, whatever may be the claims of local attachment, every American who can discern the connection between the honor, the renown,

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<sup>1</sup> Elliot, V. 409, 410. See post, as to the power of the president to assemble and adjourn Congress.

and the welfare of his country, and the dignity, convenience, and safety of its government, must turn with affection and pride.

With respect to a regular time of meeting, no instructions had been given to the committee of detail; but they inserted in their draft of the Constitution a clause which required the legislature to assemble on the first Monday of December in every year. There was, however, a great difference of opinion as to the expediency of designating any time in the Constitution, and as to the particular period adopted in the report. But, as it was generally agreed that the Congress ought to assemble annually, the provision which now stands in the Constitution, which requires annual sessions and establishes the first Monday in December as the time of their commencement, unless a different day shall be appointed by law, was adopted as a compromise of different views.<sup>1</sup>

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<sup>1</sup> Mr. Justice Story has stated in his Commentaries (§ 829) that this clause came into the Constitution in the *revised* draft, near the close of the Convention, and was silently adopted, without opposition. This is a mistake. The clause was contained in the draft of the committee of detail, and was modified, as stated in the text, on the 7th of August, after a full debate. Elliot, V. 377, 383-385.

## CHAPTER XXVI.

REPORT OF THE COMMITTEE OF DETAIL, CONTINUED.—THE POWERS OF CONGRESS.—THE GRAND COMPROMISES OF THE CONSTITUTION RESPECTING COMMERCE, EXPORTS, AND THE SLAVE-TRADE.

IN the examination which has thus far been made of the process of forming the Constitution, the reader will have noticed the absence of any express provisions concerning the regulation of commerce and the obtaining of revenues. A system of government had been framed, embracing a national legislature, in which the mode of representation alone had been determined with precision. The powers of this legislature had been described only in very general terms. It was to have "the legislative rights vested in Congress by the Confederation," and the power "to legislate in all cases for the general interests of the Union, and also in those to which the states were separately incompetent, or in which the harmony of the United States may be interrupted by the exercise of individual legislation."

It might undoubtedly have been considered that, as the want of a power in the Confederation to make uniform commercial regulations affecting the foreign and domestic relations of the states was one of the principal causes of the assembling of this Convention, such a power was implied in the terms of the resolution, which had declared the general principles on which the authority of the national legislature ought to be regulated. Still, it remained to be determined what kind of regulation of commerce was required by "the general interests of the Union," or how far the states were incompetent, by their separate legislation, to deal with the interests of commerce so as to promote "the harmony of the United States." In the same way a power to obtain revenues might be implied on the same general principles. But whether the commercial power foreshadowed in these broad declarations was to be limited or unlimited; whether there were any

special objects or interests to which it was not to extend; and whether the revenues of the government were to be derived from imposts laid at pleasure upon imports or exports, or both; whether they might be derived from excises on the manufactures or produce of the country; whether its power of direct taxation was to be exercised under further limitations than those already agreed upon for the apportionment of direct taxes among the states—all these details were as yet entirely unsettled.

Two subjects, one of which might fall within a general commercial power, and the other within a general power to raise revenues, had already been incidentally alluded to, and both were likely to create great embarrassment. General Pinckney had twice given notice that South Carolina could not accede to the new Union proposed if it possessed a power to tax exports.<sup>1</sup> It had also become apparent, in the discussions and arrangements respecting the apportionment of representatives, that the possible encouragement of the slave-trade, which might follow an admission of the blacks into the rule of representation, was one great obstacle, in the view of the Northern States, to such an admission; and at the same time that it was very doubtful whether all the Southern States would surrender to the general government the power to prohibit that trade.<sup>2</sup> The compromise which had already taken place on the subject of representation had settled the principles on which that difficult matter was to be arranged. But the power to increase the slave populations by continued importation had not been agreed to be surrendered; and unless some satisfactory and reasonable adjustment could be made on this subject, there could be no probability that the Constitution would be finally ratified by the people of the Northern States.<sup>3</sup> It is necessary, therefore, to look carefully at these two subjects, namely, the taxation of exports and the prohibition of the slave-trade.

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<sup>1</sup> See Madison, Elliot, V. 302, 357.

<sup>2</sup> See the remarks of Gouverneur Morris in the debate on the apportionment of representatives, in which he stated the dilemma precisely in this way. Elliot, V. 301.

<sup>3</sup> No candid man, said Rufus King, could undertake to justify to them a system under which slaves were to continue to be imported, and to be represented, while the exports produced by their labor were not to pay any part of the expenses of the government which would be obliged to defend their masters against domestic insurrections or foreign attacks. Elliot, V. 391.

That a power to lay taxes or duties on exported products belongs to every government possessing a general authority to select the objects from which its revenues are to be derived, is a proposition which admits of little doubt. It is not to be doubted, either, that it is a power which may be attended with great benefit, not only for purposes of revenue, but for the encouragement of manufactures; and it is clear that it may often be used as a means of controlling the commercial policy of other countries, when applied to articles which they cannot produce, but which they must consume. A government that is destitute of this power is not armed with the most complete and effectual means for counteracting the regulations of foreign countries that bear heavily upon the industrial pursuits of its people, although it may have other and sufficient sources of revenue; and therefore, until an unrestricted commercial intercourse and a free exchange of commodities become the general policy of the world, to deny to any government a power over the exported products of its own country is to place it at some disadvantage with all commercial nations that possess the power to enhance the price of commodities which they themselves produce.

But, on the other hand, the practice of taxing the products of a country, as they pass out of its limits to enter into the consumption of other nations, can be beneficially exercised only by a government that can select and arrange the objects of such taxation so as to do nearly equal justice to all its producing interests. If, for example, the article of wine were produced only by a single province of France, and all the other provinces produced no commodities sought for by other nations, an export duty upon wine would fall wholly upon the single province where it was produced, and would place its production at an unequal competition with the wines of other countries. But France produces a variety of wines, the growth of many different provinces; and therefore, in the adjustment of an export duty upon wines, the government of that country, after a due regard to the demand for each kind or class of this commodity, has chiefly to consider the effect of such a tax in the competition with the same commodity produced by other nations.

At the time of the formation of the Constitution of the United States, there was not a single production common to all

the states of sufficient importance to become an article of general exportation. Indeed, there were no commodities produced for exportation by so many of the states that a tax or duty imposed upon them on leaving the country would operate with anything like equality even in different sections of the Union. In fact, from the extreme northern to the extreme southern boundary of the Union, the exports were so various, both in kind and amount, that a tax imposed on an article the produce of the South could not be balanced by a tax imposed upon an article produced or manufactured at the North. How, for example, could the burden of an export duty on the tobacco of Virginia, or the rice or indigo of South Carolina, be equalized by a similar duty on the lumber or fish or flour of other states? Possibly, after long experience and the accumulation of the necessary statistics, an approach towards an equality of such burdens might have been made; but it could never have become more than an unsatisfactory approximation; and while the effect of such a tax at one end of the Union on the demand for the commodity subjected to it might be estimated—because the opportunity for other nations to supply themselves elsewhere might be so precise as to be easily measured—its effect at the other end of the Union, on another commodity, might be wholly uncertain, because the demand from abroad might be influenced by new sources of supply, or might from accidental causes continue to be nearly the same as before.

However theoretically correct it might have been, therefore, to confer on the general government the same authority to tax exports as to impose duties on imported commodities—and the argument for it drawn from the necessities for revenue and protection of manufactures was exceedingly strong—the actual situation of the country made it quite impracticable to obtain the consent of some of the states to a full and complete revenue power. Several of the most important persons in the Convention were strongly in favor of it. Washington, Madison, Wilson, Gouverneur Morris, and Dickinson are known to have held the opinion that the government would be incomplete without a power to tax exports as well as imports. But the decided stand taken by South Carolina, whose exports for a single year were said by General Pinckney to have amounted to £600,000, the fruit of the labor of her slaves, probably led the committee of detail to insert

in their report of a draft of the Constitution a distinct prohibition against laying any tax or duty on articles exported from any state.

A similar question, in relation to the extent of the commercial power, was destined to arise out of the relations of the different states to the slave-trade. If the power to regulate commerce, that might be conferred upon the general government, was to be universal and unlimited, it must include the right to prohibit the importation of slaves. If the right to sanction or tolerate the importation of slaves, which, like all other political rights, belonged to the people of the several states as sovereign communities, was to be retained by them as an exception from the commercial power which they might confer upon the national legislature, that exception must be clearly and definitely established. For several reasons the question was necessarily to be met as soon as the character and extent of the commercial power should come into discussion. While the trade had been prohibited by all the other states, including Virginia and Maryland, it had only been subjected to a duty by North Carolina, and was subjected to a similar discouragement by South Carolina and Georgia. The basis of representation in the national legislature, in which it had been agreed that the slaves should be included in a certain ratio, created a strong political motive with the Northern States to obtain for the general government a power to prevent further importations. It was fortunate that this motive existed; for the honor and reputation of the country were concerned to put an end to this traffic. No other nation, it was true, had at that time abolished it; but here were the assembled states of America, engaged in framing a constitution of government that ought, if the American character was to be consistent with the principles of the American Revolution, to go as far in the recognition of human rights as the circumstances of their actual situation would admit. What was practicable to be done, from considerations of humanity, and all that could be successfully done, was the measure of their duty as statesmen, admitted and acted upon by the framers of the Constitution, including many of those who represented slaveholding constituencies, as well as the representatives of states that had either abolished both the traffic in slaves and the institution itself, or were obviously destined to do it.

This just and necessary rule of action, however, which limited their efforts to what the actual circumstances of the country would permit, made a clear distinction between a prohibition of the future importation of slaves and the manumission of those already in the country. The former could be accomplished, if the consent of the people of the states could be obtained, without trenching on their sovereign control over the condition of all persons within their respective limits. It involved only the surrender of a right to add to the numbers of their slaves by continued importations. But the power to determine whether the slaves then within their limits should remain in that condition could not be surrendered by the people of the states without overturning every principle on which the system of the new government had been rested, and which had thus far been justly regarded as essential to its establishment and to its future successful operation.

It is not, therefore, to be inferred, because a large majority of the Convention sought for a power to prohibit the increase of slaves by further importation, that they intended by means of it to extinguish the institution of slavery within the states. So far as they acted from a political motive, they designed to take away the power of a state to increase its congressional representation by bringing slaves from Africa; and, so far as they acted from motives of general justice and humanity, they designed to terminate a traffic which never has been and never can be carried on without infinite cruelty and national dishonor. That the individuals of an inferior race, already placed in the condition of servitude to a superior one, may, by the force of necessity, be rightfully left in the care and dominion of those on whom they have been cast, is a proposition of morals entirely fit to be admitted by a Christian statesman. That new individuals may rightfully be placed in the same condition, not by the act of Providence through the natural increase of the species, but by the act of man in transferring them from distant lands, is quite another proposition. The distinction between the two, so far as a moral judgment is concerned with the acts of the framers of the Constitution upon the circumstances before them, defines the limits of duty which they intended to recognize.

No satisfactory means exist for determining to what extent a



continuance of the importation of slaves was necessary, in an economical point of view, to the states of North Carolina, South Carolina, and Georgia. There is some reason to suppose that the natural increase of the slave population in Virginia at that period more than supplied her wants; and perhaps the less healthy regions of the more southern states may have still required foreign supplies in order to keep the lands already occupied under cultivation, or to make new lands productive.<sup>1</sup> All that is historically certain on this subject is, that the representatives of the three most southerly states acted upon the belief that their constituents would not surrender the right to continue the importation of slaves, although they might, if left to themselves, discontinue the practice at some future time.

These declarations, however, had not been made at the time when the principles on which the Constitution was to be framed were sent to the committee of detail. Nothing had yet occurred in the Convention to make it certain that the power to import would be retained by any of the states. The committee of detail had, therefore, so far as the action of the Convention had gone, an unrestricted choice between a full and a limited commercial power. They consisted of three members from non-slaveholding and two from slaveholding states;<sup>2</sup> but as one of them, Mr. Rutledge of South Carolina, was one of the persons who subsequently announced to the Convention the position that would be taken by his own state and by North Carolina and Georgia, there can be no doubt that he announced the same determination in the committee. In their report they shaped the commercial power accord-

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<sup>1</sup> See the remarks of Mr. Ellsworth and General Pinckney, as reported by Mr. Madison, Elliot, V. 458, 459.

<sup>2</sup> They were Messrs. Rutledge, Randolph, Gorham, Ellsworth, and Wilson. I have classed Mr. Ellsworth among the representatives of non-slaveholding states; for although there were between two and three thousand slaves in Connecticut at this time, provision had already been made for its prospective and gradual abolition. It was not finally extinct in that state until after the year 1840. The United States census for 1790 returned 2759 slaves for Connecticut; the census for 1840 returned 17; in the census for 1850 none were returned. A like gradual abolition took place in New Hampshire, Rhode Island, Vermont, New York, and Pennsylvania. In Massachusetts slavery was abolished by the State Constitution of 1780.

ingly. They provided that the legislature of the United States should have power to lay and collect taxes, duties, imposts, and excises, and to regulate commerce with foreign nations and among the several states.

But they also reported several restrictions upon both the revenue and commercial powers. Besides providing, in accordance with the ninth resolution adopted by the Convention, that direct taxation should be proportioned among the states according to the census, to be taken by a particular rule, they added the further restrictions, that no tax or duty should be laid by the national legislature on articles exported from any state, nor on the migration or importation of such persons as the several states might think proper to admit; that such migration or importation should not be prohibited; that no capitation tax should be laid, unless in proportion to the census; and that no navigation act should be passed without the assent of two thirds of the members present in each house.

That the new government must have a direct revenue power was generally conceded, and it was also generally admitted that it must have a power to regulate commerce with foreign countries. But the idea was more or less prevalent among the Southern statesmen that the interest of their own states, considered as a distinct and separate interest from that of the commercial states, did not require a regulation of commerce by the general government. It is not easy to determine to what extent these views were correct. Taking into consideration nothing more than the fact that the staple production of Virginia was tobacco, as it was also partly that of North Carolina; that rice and indigo were the great products of South Carolina and Georgia; and that neither of these four states possessed a large amount of shipping—it might certainly be considered that an unrestricted foreign intercourse was important to them.

But, on the other hand, if those states, by clothing the Union with a power to regulate commerce, were likely to subject themselves to a temporary rise of freights, the measures which might have that effect would also tend directly to increase Southern as well as Northern shipping, to augment the commercial marine of the whole country, and thus to increase its general maritime strength. The general security thus promoted was as important

to one class of states as to another. The increase of the coasting trade would also increase the consumption of the produce of all the states. The great benefit, however, to be derived from a national regulation of commerce—a benefit in which all the states would equally share, whatever might be their productions—was undoubtedly the removal of the existing and injurious retaliations which the states had hitherto practised against each other.<sup>1</sup>

Still, these advantages were indirect or incidental. The immediate and palpable commercial interests of different portions of the Union, regarded in the mass, were not identical; and it was in one sense true that the power of regulating commerce was a concession on the part of the Southern States to the Northern, for which they might reasonably expect equivalent advantages, or which they might reasonably desire to qualify by some restriction.

On the reception of the report of the committee of detail, and when the article relating to representation was reached, the consequences of agreeing that the slaves should be computed in the rule, taken in connection with an unrestrained power in the states to increase the slave populations by further importation, and with the exemption of exports from taxation, became more prominent, and more likely to produce serious dissatisfaction. The concession of the slave representation had been made by some of the Northern members, in the hope that it might be the means of strengthening the plan of government, and of procuring for it full powers both of revenue and of commercial regulation. But now it appeared that, as to two very important points, the hands of the national legislature were to be absolutely tied. The importation of slaves could not be prohibited; exports could not be taxed. These restrictions seemed to many to have an inevitable tendency to defeat the great primary purposes of a national government. All must agree, that defence against foreign invasion and against internal sedition was one of the principal objects for which such a government was to be established. Were all the states then to be bound to defend each, and was each to be at liberty to introduce a weakness which would increase both its own and the general danger, and at the same time to withhold the compensation

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<sup>1</sup> See the remarks of Mr. Madison, Elliot, V. 490.

for the burden? If slaves were to be imported, why should not the exports produced by their labor supply a revenue that would enable the general government to defend their masters? To refuse it was so inequitable and unreasonable, said Rufus King, that he could not assent to the representation of the slaves, unless exports should be taxable; perhaps he could not finally consent to it, under any circumstances.<sup>1</sup>

Gouverneur Morris, with his accustomed ardor, went further still, and insisted on reopening the subject of representation, now that the other features of the system were to be made to favor the increase of slaves, and to throw the burdens of maintaining the government chiefly upon the Northern States. It was idle, he declared, to say that direct taxation might be levied upon the slave-holding states in proportion to their representative population; for the general government could never stretch out its hand and put it directly into the pockets of the people over so vast a country. Its revenues must be derived from exports, imports, and excises. He therefore would not consent to the sacrifices demanded, and moved the insertion of the word "free" before the word "inhabitants," in the article regulating the basis of representation.<sup>2</sup>

But there were few men in the Convention bold enough to hazard the consequences of unsettling an arrangement which had cost so much labor and anxiety; which had been made as nearly correct in theory as the circumstances of the case would allow; and which was, in truth, the best practical solution of a great difficulty. Mr. Morris's motion received the vote of a single state only.<sup>3</sup> The great majority of the delegations considered it wiser to go on to the discussion of the proposed restrictions upon the revenue and commercial powers, in the hope that each of them might be considered and acted upon with reference to the true principles applicable to the subject, or that the whole might be adjusted by some agreement that would not disturb what had been settled with so much difficulty.

The great embarrassment attending the proposed restriction upon the taxation of exports was, that, however the question might be decided, it would probably lose for the new government the

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<sup>1</sup> Madison, Elliot, V. 391, 392.

<sup>2</sup> Ibid., 392, 393.

<sup>3</sup> New Jersey.

support of some important members of the Convention. Those who regarded it as right that the government should have a complete revenue power contended for the convenience with which a large staple production, in which America was not rivalled in foreign markets, could be made the subject of an export tax that would in reality be paid by the foreign consumer. On the other side, the very facility with which such objects could be selected for taxation alarmed the states whose products presented the best opportunity for exercising this power. They did not deny the obvious truth that the tax must ultimately fall on the consumer; but they considered it enough to surrender the power of levying duties upon imports, without giving up the control which each state now had over its own productions.<sup>1</sup>

But there was also another question involved in the form in which the proposed restriction had been presented. It prohibited the national government from taxing exports, but imposed no restraint in this respect upon the power of the states. If they were to retain the power over their own exports, they would have the same right to tax the products of other states exported through their maritime towns. This power had been used to a great extent, and always oppressively. Virginia had taxed the tobacco of North Carolina; Pennsylvania had taxed the products of Maryland, of New Jersey, and of Delaware; and it was apparent that every state, not possessed of convenient and accessible seaports, must hereafter submit to the same exactions, if this power were left unrestrained. Give it to the general government, said the advocates for a full revenue power, and the inconveniences attending its exercise by the separate states will be avoided. But those who were opposed to the possession of such a power by the general government apprehended greater oppression by a majority of the states acting through the national legislature than they could suffer at the hands of individual states. The eight Northern States, they said, had an interest different from the five Southern States, and in one branch of the legislature the former were to have thirty-six votes, and the latter twenty-nine.

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<sup>1</sup> The opposition to a power to tax exports was not confined to the members from North and South Carolina and Georgia. Ellsworth and Sherman of Connecticut, Mason of Virginia, and Gerry of Massachusetts considered such a power wrong in principle, and incapable of being exercised with equality and justice.

From considerations like these, united with others which would render it nearly impracticable to select the objects of such taxation so as to make it operate equally, the restriction prevailed.<sup>1</sup> The revenue power was thus shorn of one great branch of taxation, which, however difficult it might be to practise it throughout such a country as this, is part of the prerogatives of every complete government, which was believed by many to be essential to the success of the proposed Constitution, but which was resisted successfully by others, as oppressive to their local and peculiar interests.

Was the commercial power to experience a like diminution from the full proportions of a just authority over the external trade of the states? Were the states, whose great homogeneous products, derived from the labor of slaves, would supply no revenue to the national treasury, to be left at liberty to import all the slaves that Africa could furnish? Were the commercial states to see the carrying trade of the country—embracing the very exports thus exempted from burdens of every kind, and thus stimulated by new accessions of slaves—pass into foreign bottoms, and be unable to protect their interests by a majority of votes in the national legislature? Was there to be no advantageous commercial treaty obtained from any foreign power unless the measures needful to compel it could gain the assent of two thirds of Congress? Was the North to be shut out forever from the West India trade, and was it at the same time to see the traffic in slaves prosecuted without restraint, and without the prospect or the hope of a final termination?

These were grave and searching questions. The vote exempting exports from the revenue power could not be recalled. It had passed by a decided majority of the states; and many suffrages

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<sup>1</sup> The vote was taken (August 21st) upon so much of the fourth section of the seventh article of the reported draft as affirmed that "no tax or duty shall be laid by the legislature on articles exported from any state." Massachusetts, Connecticut, Maryland, Virginia (Washington and Mr. Madison, *no*), North Carolina, South Carolina, Georgia, *ay*, 7; New Hampshire, New Jersey, Pennsylvania, Delaware, *no*, 4.—If the subject had been left in this position, exports would have been taxable by the states. The plan of restraining the power of the states over exports was subsequently adopted, after the compromise involving the revenue and commercial powers of the general government had been settled.

had been given for the exemption, not from motives of a sectional nature, but on account of the difficulty that must attend the exercise of the power, and from the conviction that such taxation is incorrect in principle. So far, therefore, the Southern States had gained all that they desired in respect to the revenue power, and now three of them, with great firmness, declared that the question in relation to the commercial power was, whether they should or should not be parties to the Union. If required to surrender their right to import slaves, North Carolina, South Carolina, and Georgia would not accept the Constitution, although they were willing to make slaves liable to an equal tax with other imports.<sup>1</sup> It was also manifest that the clause which required a navigation act to be passed by two thirds of each house was to be insisted on by some, although not by all, of the Southern members.

Thus was a dark and gloomy prospect a second time presented to the framers of the Constitution. If, on the one side, there were states feeling themselves bound as a class to insist on certain concessions, on the other side were those by whom such concessions could not be made. The chief motive with the Eastern, and with most of the Northern States, in seeking a new union under a new frame of government, was a commercial one. They had suffered so severely from the effects of the commercial policy of England and other European nations, and from the incapacity of Congress to control that policy, that it had become indispensable to them to secure a national power which could dictate the terms and vehicles of commercial intercourse with the whole country. Cut off from the British West India trade by the English Orders in Council, the Eastern and Middle States required other means of counteracting those oppressive regulations than could be found in their separate state legislation, which furnished no power whatever for obtaining a single commercial treaty.<sup>2</sup> Besides these considerations, which related to the special interests of the commercial states, the want of a navy, which could only be built up by measures that would encourage the growth of the mercantile marine, and which, although needed for the protection of commerce, was also required for the defence of the whole country,

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<sup>1</sup> Elliot, V. 457-461.

<sup>2</sup> See ante, on the origin and necessity of the commercial power.

made it necessary that the power to pass a navigation act should be burdened with no serious restrictions.

The idea of requiring a vote of two thirds in Congress for the passage of a navigation act, founded on the assumed diversity of Northern and Southern, or the commercial and the planting interests, proceeded upon the necessity for a distinct protection of the latter against the former, by means of a special legislative check. To a certain extent, as I have already said, these interests, when regarded in their aggregates, offered a real diversity. But it did not follow that this peculiar check upon the power of a majority was either a necessary or an expedient mode of providing against oppressive legislation. In every system of popular government there are great disadvantages in departing from the simple rule of a majority; and perhaps the principle which requires the assent of more than a majority ought never to be extended to mere matters of legislation, but should be confined to treaty stipulations, and to those fundamental changes which affect the nature of the government and involve the terms on which the different portions of society are associated together.

It was undoubtedly the purpose of those who sought for this particular restriction to qualify the nature of the government in its relation to the interests of commerce. But the real question was, whether there existed any necessary reason for placing those interests upon a different footing from that of all other subjects of national legislation. The operation of the old rule of the Confederation, which required the assent of nine states in Congress to almost all the important measures of government, many of which involved no fundamental right of separate states, had revealed the inconveniences of lodging in the hands of a minority the power to obstruct just and necessary legislation. If, indeed, it was highly probable that the power, by being left with a majority, would be abused—if the interests of the Eastern and Middle States were purely and wholly commercial, and would be likely so to shape the legislation of the country as to encourage the growth of its mercantile marine, at the expense of other forms of industry and enterprise, and no other suitable and efficient checks could be found—then the restriction proposed might be proper and necessary.

But in truth the separate interests of the Eastern and Middle



States, when closely viewed, were not in all respects the same. Connecticut and New Jersey were agricultural states. New York and Pennsylvania, although interested in maritime commerce, were destined to be great producers of the most important grains. Maryland, although a commercial, was also an agricultural state. The new states likely to be formed in the West would be almost wholly agricultural, and would have no more shipping than might be required to move the surplus products of their soil upon their great inland lakes towards the shores of the Atlantic. All these states, existing and expectant, were interested to obtain commercial treaties with foreign countries; all needed the benefits of uniform commercial regulations; but they were not all equally interested in a high degree of encouragement to the growth of American shipping, by means of a stringent navigation act that would bear heavily upon the Southern planter.

Not only was there a very considerable protection against the abuse of its power by a sectional majority, in these more minute diversities of interest, but there were also two very efficient legislative checks upon that power already introduced into the government. If an unjust and oppressive measure had commanded a majority in the House it might be defeated in the Senate, or, if that check should fail, it might be arrested by the executive.

It had, nevertheless, been made part of the limitations upon the commercial power, embraced in the report of the committee of detail, that a navigation act should require a vote of two thirds of both branches of the legislature. The vote which adopted the prohibition against taxes on exports, taken on the 21st of August, was followed, on that day and the next, by an excited debate on the taxation of the slave-trade, in which the three states of Georgia, North Carolina, and South Carolina made the limitation upon the power of the Union over this traffic the condition of their accepting the Constitution. This debate was closed by the proposition of Gouverneur Morris, to refer the whole subject to a committee of one from each state, in order that the three matters of exports, the slave-trade, and a navigation act might form a bargain or compromise between the Northern and the Southern states.<sup>1</sup> But the prohibition against taxing exports had already

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<sup>1</sup> Elliot, V. 460.

been agreed to, and there remained to be committed only the proposed restriction against taxing or prohibiting the migration or importation of such persons as the states might see fit to admit, the restriction which required a capitation tax to conform to the census, and the proposed limitation upon the power to pass a navigation act. Thus, in effect, the questions to come before this committee were, whether the slave-trade should be excepted from both the commercial and revenue powers of the general government, and whether the commercial power should be subjected to a restriction which required a vote of two thirds in dealing with the commercial interests of the Union.

We know very little of the deliberations of this committee; but as each state was equally represented in it, and as the position of the different sectional objects is quite clear, we can have no difficulty in forming an opinion as to the motives and purposes of the settlement which resulted from their action, or in obtaining a right estimate of the result itself.

In the first place, then, we are to remember the previous concessions already made by the Northern States, and the advantages resulting from them. These concessions were the representation of the slaves and the exemption of exports from taxation. If the slaves had not been included in the system of representation, the Northern States could have had no political motive for acquiring the power to put an end to the slave-trade. If the exports of their staple productions had not been withdrawn from the revenue power, the Southern States could have had no very strong or special motive to draw them into the new Union; but with such an exemption they could derive benefits from the Constitution as great as those likely to be enjoyed by their Northern confederates. Both parties, therefore, entered the final committee of compromise with a strong desire to complete the Union and to establish the new government. The Northern States wished for a full commercial power, including the slave-trade and navigation laws, to be dependent on the voices of a majority in Congress. The Southern States struggled to retain the right to import slaves, and to limit the enactment of navigation laws to a vote of two thirds. Both parties could be gratified only by conceding some portion of their respective demands.

If the Northern States could accept a future, instead of an im-

mediate, prohibition of the slave-trade, they could gain ultimately a full commercial power over all subjects, to be exercised by a national majority. If the Southern States could confide in a national majority, so far as to clothe them with full ultimate power to regulate commerce, they could obtain the continuance of the slave-trade for a limited period.

Such was in reality the adjustment made and recommended by the committee. They proposed that the migration or importation of such persons as the several states then existing might think proper to admit should not be prohibited by the national legislature before the year 1800, but that a tax or duty might be imposed on such persons, at a rate not exceeding the average of the duties laid on imports; that the clause relating to a capitation tax should remain; and that the provision requiring a navigation act to be passed by a vote of two thirds should be stricken out.<sup>1</sup>

No change was made in this arrangement when it came before the Convention, except to substitute the year 1808 as the period at which the restriction on the commercial power was to terminate, and to provide for a specific tax on the importation of slaves, not exceeding ten dollars on each person.<sup>2</sup> The remaining features

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<sup>1</sup> Elliot, V. 470, 471.

<sup>2</sup> Two grave objections were made to this settlement respecting the importation of slaves. Mr. Madison records himself as saying, in answer to the motion of General Pinckney to adopt the year 1808, that twenty years would produce all the mischief that could be apprehended from the slave-trade, and that so long a term would be more dishonorable to the American character than to say nothing about it in the Constitution. But the real question was, whether the power to prohibit the importation at any time could be acquired for the Constitution; and the facts show that it could have been obtained only by the arrangement proposed and carried. The votes of seven states against four, given for General Pinckney's motion, show the convictions then entertained. The other objection (urged by Roger Sherman and Mr. Madison) was, that to lay a tax upon imported slaves implied an acknowledgment that men could be articles of property. But it appears from the statements of other members, also recorded by Madison, that it was part of the compromise agreed upon in committee, that the slave-trade should be placed under the revenue power, in consideration of its not being placed at once within the commercial power. It also appears that the tax was made to apply to the "*importation* of such persons as the states might see fit to admit," until the year 1808, in order to include and to discourage the introduction of convicts.

But the principal object was undoubtedly the slave-trade; and this particu-

of this settlement, relating to a capitation tax and a navigation act, were sanctioned by a large majority of the states.<sup>1</sup>

Thus, by timely and well-considered concessions on each side, was the slave-trade brought immediately within the revenue power of the general government, and also, at the expiration of twenty years, within its power to regulate commerce. By the same means the commercial power, without any other restriction than that relating to the temporary toleration of the importation of slaves, was vested in a national majority. This result at once placed the foreign slave-trade by American vessels or citizens within the control of the national legislature, and enabled Congress to forbid the carrying of slaves to foreign countries; and at the end of the year 1808 it brought the whole traffic within the reach of a national prohibition.<sup>2</sup>

Too high an estimate cannot well be formed of the importance and value of this final settlement of conflicting sectional interests and demands. History has to thank the patriotism and liberality of the Northern States for having acquired, for the government of the Union, by reasonable concessions, the power to terminate the African slave-trade. We know, from almost every day's experience since the founding of the government, that individual cupidity, which knows no geographical limits, which defies public opinion whether in the North or in the South, required and still requires the restraint and chastisement of national power. The

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lar phraseology was employed, instead of speaking directly of the importation of *slaves* into the states of North Carolina, South Carolina, and Georgia, in order, on the one hand, not to give offence to those states, and, on the other, to avoid offending those who objected to the use of the word "slaves" in the Constitution. Elliot, V. 477, 478.

<sup>1</sup> That part of the compromise relating to the slave-trade, etc., was adopted in Convention by the votes of New Hampshire, Massachusetts, Connecticut, Maryland, North Carolina, South Carolina, Georgia, *ay*, 7; New Jersey, Pennsylvania, Delaware, Virginia, *no*, 4. Maryland, Virginia, North Carolina, and Georgia voted for a proposition made by C. Pinckney, to postpone the report, in order to take up a clause requiring all commercial regulations to be passed by two thirds of each house. But on the rejection of this motion, the report of the compromise committee, recommending that a two-thirds vote for a navigation act be stricken out, was agreed to, *nem. con.*; as was also the clause relating to a capitation tax.

<sup>2</sup> See the note on the American abolition of the slave-trade, *ante*.

separate authority of the states would have been wholly unequal to the suppression of the slave-trade; for even if they had all finally adopted the policy of a stringent prohibition, without a navy, and without treaties, they could never have contended against the bold artifice and desperate cunning of avarice, stimulated by the enormous gains which have always been reaped in this inhuman trade.

The just and candid voice of History has also to thank the Southern statesmen who consented to this arrangement, for having clothed a majority of the two houses of Congress with a full commercial power. They felt, and truly felt, that this was a great concession. But they looked at what they had gained. They had gained the exemption of their staple productions from taxation as objects of foreign commerce; the enumeration of their slaves in the basis of Congressional representation; and the settlement of the slave-trade upon terms not offensive to state pride. They had also gained the Union, with its power to maintain an army and a navy—with its power and duty to protect them against foreign invasion and domestic insurrection, and to secure their republican constitutions. They looked, therefore, upon the grant of the power to regulate commerce by the ordinary modes of legislation, in its relations to the interests of a great empire, whose foundations ought to be laid broadly and deeply on the national welfare.<sup>1</sup> They saw that the Revolution had cost the Eastern States enormous sacrifices of commercial wealth, and that the weakness of the Confederation had destroyed the little remnant of their trade.<sup>2</sup> They saw and admitted the necessity for an unrestrained control over the foreign commerce of the country, if it was ever to rise from the prostrate condition in which it had been placed by foreign powers. They acted accordingly; and by their action they enabled the States of North Carolina, South Carolina, and Georgia to enter the new Union without humiliation and without loss.<sup>3</sup>

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<sup>1</sup> See the remarks of John Rutledge. Madison, Elliot, V. 491.

<sup>2</sup> General Pinckney. Ibid., 489.

<sup>3</sup> The point respecting the slave-trade was insisted upon by the delegates of those three states, both as a matter of state pride and a matter of practical interest. They regarded the increase of their slave population by new importations as a thing of peculiarly domestic concern, the control of which they were unwill-

Thus was accomplished, so far as depended on the action of this Convention, that memorable compromise which gave to the Union its control over the commercial relations of the states with foreign nations and with each other. An event so fraught with consequences of the utmost importance cannot be dismissed without some of the reflections appropriate to its consideration.

Nature had marked America for a great commercial nation. The sweep of the Atlantic coast from the Bay of Fundy to the Gulf of Florida, comprehending twenty degrees of latitude, broken into capacious bays and convenient harbors, and receiving the

ing to transfer to the general government. But they also contended for a political right which their states intended to exercise. The following table, taken from the United States Census, shows that in the twenty years which elapsed from 1790 to 1810, during eighteen of which the importation of slaves could not be prohibited by Congress, the slaves of those three states increased in a ratio so much larger than the rate of increase after the year 1808 as to make it apparent that it was not a mere abstraction on which they insisted. The right to admit the importation of slaves was exercised, and was intended to be exercised—as some of the delegates of the three states declared in the Convention.

PROGRESS OF THE SLAVE POPULATION FROM 1790 TO 1850, SHOWING THE INCREASE PER CENT. IN EACH PERIOD OF TEN YEARS.

	North Carolina.	South Carolina.	Georgia.
1790 to 1800 . . . . .	32.53	36.46	102.99
1800 to 1810 . . . . .	26.65	34.35	77.12
1810 to 1820 . . . . .	21.43	31.62	42.23
1820 to 1830 . . . . .	19.79	22.62	45.85
1830 to 1840 . . . . .	0.08	3.68	29.15
1840 to 1850 . . . . .	17.38	17.71	35.85

But while the census shows that the power to admit slaves was exercised freely during the twenty years that followed the adoption of the Constitution of the United States, it also shows that the states which insisted on retaining it for that period could well afford to surrender it at the stipulated time. In 1810 the proportion of the blacks of North Carolina to the whole population was 32.24 per cent., and in 1850 it was 36.36; in South Carolina the proportion in 1810 was 48.4, and in 1850, 58.93; in Georgia, in 1810 it was 42.4, and in 1850, 42.44. It is not probable, therefore, that the prosperity of those states was diminished by the discontinuance of the slave-trade. The constitutional power of Congress to prohibit the importation took effect and was exercised in 1808. The great diminution in the rates of increase during this period is probably due to the removal of slaves into Alabama, Arkansas, Louisiana, and Texas.

inward flow of the sea into great navigable rivers that stretched far into the interior, presented an access to the ocean not surpassed by that of any large portion of the globe. This long range of sea-coast embraced all the varieties of climate that are found between a hard and sterile region, where summer is but the breath of a few fervid weeks, and the ever-blooming tropics, where winter is unknown. The products of the different regions, already entering, or fit to enter, into foreign commerce, attested as great a variety of soils. The proximity of the country to the West Indies, where the Eastern and the Middle States could find the best markets for some of their most important exports, afforded the promise of a highly lucrative trade, while the voyage to the East Indies from any American port could be performed in as short a time as from England or Holland or France. In the South there were great staples already largely demanded by the consumption of Europe. In the North there were fisheries of singular importance, capable of furnishing important additions to the wealth of the country. Beyond the Alleghanies the West, with its vast internal waters and its almost unequalled fertility, had been opened to a rapid emigration, which was soon to lay the foundation of new states, destined to be the abodes of millions of men.

The very variety and extent of these interests had for many years occasioned a struggle for some mode of reconciling and harmonizing them all. But, divided into separate governments, the commercial legislation of the states could produce nothing but the confusion and uncertainty which retaliation necessarily engenders. Different systems and rates of revenue were in force in seaports not a hundred miles apart, through which the inhabitants of other jurisdictions were obliged to draw their supplies of foreign commodities and to export their own productions. The paper-money systems of the several states made the commercial value of coin quite different in different places, and gave an entirely insecure basis to trade.

The reader who has followed me through the preceding chapters has seen how the people of the United States, from the earliest stages of the Revolution, struggled to free themselves from these embarrassments: how they commenced with a jealous reservation of state authority over all matters of commerce and revenue; how they undertook to supply the necessities of a central

government by contributions which they had not the power to make good, because their commercial condition did not admit of heavy taxation; how they endeavored to pass from this system to a grant of temporary revenues and temporary commercial regulation, to be vested in the federal Union; how they found it impracticable to agree upon the principles and details of a temporary power; how they turned to separate commercial leagues, each with its immediate neighbors, and were disappointed in the result or frustrated in the effort; and how at last they came to the conception of a full and irrevocable surrender of commercial and fiscal regulations to a central legislature, that could grasp the interests of the whole country and combine them in one harmonious system.

The influence of the commercial and revenue powers thus obtained by the general government, on the condition of this country, has far exceeded the most sanguine hopes which the framers of the Constitution could have indulged. No one can doubt that the people of America owe to it both the nature and the degree of their actual prosperity; and as the national prosperity has given them importance in the world, it is just and accurate to say that commerce and its effects have elevated republican institutions to a high dignity and influence. Let the reader consider the interests of commerce, in their widest relations with all that they comprehend—the interests of the merchant, the artisan, and the tiller of the soil being alike involved—as the chief purpose of the new government given to this Union; let him contemplate this as the central object around which are arranged almost all the great provisions of the Constitution of the United States, and he will see in it a wonderfully harmonious and powerful system, created for the security of property and the promotion of the material welfare and prosperity of individuals, whatever their occupation, employment, or condition. That such a code of civil government should have sprung from the necessities of commerce is surely one of the triumphs of modern civilization.

It is not to be denied that the sedulous care with which this great provision was made for the general prosperity has had the effect of impressing on the national character a strong spirit of acquisition. The character of a people, however, is to be judged not merely by the pursuit or the possession of wealth, but chiefly



by the use which they make of it. If the inhabitants of the United States can justly claim distinction for the benevolent virtues; if the wealth that is eagerly sought and rapidly acquired is freely used for the relief of human suffering; if learning, science, and the arts are duly cultivated; if popular education is an object of lavish expenditure; if the institutions of religion, though depending on a purely voluntary support, are provided for liberally and from conscientious motives—then is the national spirit of acquisition not without fruits of which it has no need to be ashamed.

The objection that the Constitution of the United States and the immense prosperity which has flowed from it were obtained by certain concessions in favor of the institution of slavery results from a merely superficial view of the subject. If we would form a right estimate of the gain or loss to human nature effected by any given political arrangement, we must take into consideration the antecedent facts, and endeavor to judge whether a better result could have been obtained by a different mode of dealing with them. We shall then be able to appreciate the positive good that has been gained or the positive loss that has been suffered.


The prominent facts to be considered are, in the first place, that slavery existed, and would continue to exist, in certain of the states, and that the condition of the African race in those states was universally regarded as a matter of purely local concern. It could not, in fact, have been otherwise, for there were slaves in every state excepting Massachusetts and New Hampshire; and among the other states in which measures had been, or were likely to be, taken for the removal of slavery there was a great variety of circumstances affecting the time and mode in which it should be finally extinguished. As soon as the point was settled, in the formation of the Constitution of the United States, that the state governments were to be preserved, with all their powers unimpaired which were not required by the objects of the national government to be surrendered to the Union, the domestic relations of their inhabitants with each other necessarily remained under their exclusive control. Those relations were not involved in the purposes of the federal Union.

So soon, also, as this was perceived and admitted, it became a necessary consequence of the admission that the national author-

ity should guarantee to the people of each state the right to shape and modify their own social institutions; for without this principle laid at the foundation of the Union there could be no peace or security for such a mixed system of government.

In the second place, we have to consider the fact that, among the political rights of the states anterior to the national Constitution, was the right to admit or prohibit the further importation of slaves—a traffic not then forbidden by any European nation to its colonies, but which had been interdicted by ten of the American states. The transfer of this right to the federal Union was a purely voluntary act; it was not strictly necessary for the purposes for which it was proposed to establish the Constitution of the United States; although there were political reasons for which a part of the states might wish to acquire control over this subject, as well as moral reasons why all the states should have desired to vest that control in the general government. Three of the states, however, as we have seen, took a different view of their interest and duty, and declined to enter the new Union unless this traffic should be excepted from the power over commerce for a period of twenty years.

It is quite plain that, if these facts had been met and dealt with in a manner different from the settlement that was actually made, one of two consequences must have ensued:—either no Constitution at all could have been adopted, or there would have been a union of some kind, from which three at least of the states must have been excluded. If the first, by far the most probable contingency, had happened, a great feebleness and poverty of society must have continued to be the lot of all these states; there must have been perpetual collisions and rival confederacies; there certainly would have been an indefinite continuance of the slave-trade, accompanied and followed by a great external pressure upon the states which permitted it, which would have led to a war of races, or to a frightful oppression of the slaves. Most of these evils would have followed the establishment of a partial confederacy.



## CHAPTER XXVII.

### REPORT OF THE COMMITTEE OF DETAIL, CONTINUED.—THE REMAINING POWERS OF CONGRESS.—RESTRAINTS UPON CONGRESS AND UPON THE STATES.

IN the last preceding chapter the reader has traced the origin of the revenue and commercial powers, and of certain restrictions applied to them in the progress of those great compacts by means of which they became incorporated into the Constitution. We have now to examine some other qualifications which were annexed to those powers after the first draft of the instrument had been prepared and reported by the committee of detail.

That committee had presented a naked power to lay and collect taxes, duties, imposts, and excises,<sup>1</sup> with a certain restriction as to the taxation of exports, the final disposition of which has been already described; but they had designated no particular objects to which the revenues thus derived were to be applied. The general clause embracing the revenue power was affirmed unanimously by the Convention, on the 16th of August, leaving the exception of exports for future action. At a subsequent period we find the words, "to pay the debts and provide for the common defence and general welfare of the United States," added to the clause which empowers Congress to levy taxes and duties; and it is a somewhat important inquiry, how and with what purpose they were placed there.

While the powers proposed by the committee of detail were under consideration, Mr. Charles Pinckney introduced several topics designed to supply omissions in their report, which were thereupon referred to that committee. The purpose of one of his suggestions was to provide, on the one hand, that funds appropriated for the payment of public creditors should not, during the

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<sup>1</sup> Art. VII. § 1 of the first draft of the Constitution. Elliot, V. 378.

time of such appropriation, be diverted to any other purpose; and, on the other hand, that Congress should be restrained from establishing perpetual revenues. Another of his suggestions contemplated a power to secure the payment of the public debt, and still another to prevent a violation of the public faith when once pledged to any public creditor.<sup>1</sup> Immediately after this reference Mr. Rutledge moved for what was called a grand committee,<sup>2</sup> to consider the expediency of an assumption by the United States of the state debts; and after some discussion of the subject, such a committee was raised, and Mr. Rutledge's motion was referred to them, together with a proposition introduced by Mr. Mason for restraining grants of perpetual revenue.<sup>3</sup> Thus it appears that the principal subject involved in the latter reference was the propriety of inserting in the Constitution a specific power to make special appropriations for the payment of debts of the United States and of the several states, incurred during the late war for the common defence and general welfare; and not to make a declaration of the general purposes for which revenues were to be raised. Both committees, however, seemed to have been charged with the consideration of some restraint on the revenue power, with a view to prevent perpetual taxes of any kind. The grand committee reported first, presenting the following special provision: "The legislature of the United States shall have power to fulfil the engagements which have been entered into by Congress, and to discharge, as well the debts of the United States, as the debts incurred by the several states during the late war for the common defence and general welfare."<sup>4</sup> On the following day the committee of detail presented a report, recommending that at the end of the clause already adopted, which contained the grant of the revenue power, the following words should be added: "for payment of the debts and necessary expenses of the United States; provided that no law for raising any branch of revenue, except what may be specially appropriated for the payment of interest on debts or loans, shall continue in force for more than — years."<sup>5</sup>

<sup>1</sup> August 18th. Elliot, V. 440. <sup>2</sup> A committee of one member from each state.

<sup>3</sup> Elliot, V. 441. To the same grand committee was afterwards referred the subject of the militia. See *infra*.

<sup>4</sup> August 21st. Elliot, V. 451.

<sup>5</sup> August 22d. Ibid., 462.

Two distinct propositions were thus before the Convention. One of them contemplated a qualification of the revenue power, the other did not. One was to give authority to Congress to pay the revolutionary debt, both of the United States and of the states, and to fulfil all the engagements of the Confederation; the other was to declare that revenues were to be raised and taxes levied for the purpose of paying the debts and necessary expenses of the United States, limiting all revenue laws, excepting those which were to appropriate specific funds to the payment of interest on debts or loans, to a term of years. When these propositions came to be acted upon, that reported by the grand committee was modified into the declaration that "all debts contracted and engagements entered into, by or under the authority of Congress, shall be as valid against the United States, under this Constitution, as under the Confederation." The state debts were thus left out; the declaration was prefixed, as an amendment, to the clause which granted the revenue power, and was thus obviously no qualification of that power.<sup>1</sup>

But it was thought by Mr. Sherman that the clause for laying taxes and duties ought to have connected with it an express provision for the payment of the old debts; and he accordingly moved to add to that clause the words, "for the payment of said debts, and for the defraying the expenses that shall be incurred for the common defence and general welfare." This was regarded by the Convention as unnecessary, and was therefore not adopted.<sup>2</sup> But the provision reported by the committee of detail, which was intended as a qualification of the revenue power, by declaring the objects for which taxes and duties were to be levied, had not yet been acted upon, and on the 31st of August this, with all other matters not disposed of, was referred to a new grand committee, who, on the 4th of September, introduced an amendment to the revenue clause, which made it read as follows: "The legislature shall have power to lay and collect taxes, duties, imposts, and excises, to pay the debts, and provide for the common defence and

<sup>1</sup> See the proceedings which took place, August 22d, 24th, and 25th. Elliot, V. 462-464, 471, 475-477.

<sup>2</sup> Elliot, V. 476, 477. Mr. Madison says, "This proposition, as being unnecessary, was disagreed to;" that is, unnecessary as a security of the *old debts* of the United States.

general welfare of the United States." This amendment was unanimously adopted;<sup>1</sup> and when the Constitution was revised, at the close of the proceedings, the declaration which made the debts and engagements of the Confederation obligatory upon the new Congress was separated from the context of the revenue clause and placed by itself in the *sixth* article.

There is one other restraint upon the revenue, as well as upon the commercial power, the history of which now demands our inquiries. But in order to understand it correctly, it will be necessary for the reader to recur to the position in which the revenue and commercial powers were left by the sectional compromises described in the last chapter. The struggle between the Northern and the Southern States concerning the limitations of those powers turned, as we have seen, on certain restrictions desired by the latter. They wished to have exports excepted out of the revenue power; they wished to have a vote of two thirds made necessary to the passage of any commercial regulation; and three of them wished to have the slave-trade excepted from both the revenue and the commercial powers. We have seen that the result of the sectional compromises was to leave the commercial and revenue powers unlimited, excepting by the saving in relation to the slave-trade; that they left the revenue power unlimited, excepting by the restriction concerning exports and a capitation tax; and that the commercial power was to be exercised, like other legislative powers, by a majority in Congress. General commercial and revenue powers, then, without other restrictions than these, would enable Congress to collect their revenues where they should see fit, without obliging them to adopt the old ports of entry of the states, or to consider the place where a cargo was to be unladen. They might have custom-houses in only one place in each state, or in only such states as they might choose to select, and might thus compel vessels bound from or to all the other states to clear or enter at those places. But, on the other hand, a constitutional provision which would require them to establish custom-houses at the old ports of entry of the states, without leaving them at liberty to establish other ports of entry, or to compel vessels to receive on board revenue officers before they had reached their

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<sup>1</sup> Elliot, V. 506, 507.

ports of destination, would create opportunities and facilities for smuggling.

It appears that the people of Maryland felt some apprehension that an unrestricted power to make commercial and fiscal regulations might result in compelling vessels bound to or from Baltimore to enter or clear at Norfolk, or some other port in Virginia. The delegates of Maryland accordingly introduced a proposition, which embraced two ideas: first, that Congress shall not oblige vessels, domestic or foreign, to enter or pay duties or imposts in any other state than in that to which they may be bound, or to clear from any other state than that in which their cargoes may be laden; secondly, that Congress shall not induce vessels to enter or clear in one state in preference to another, by any privileges or immunities.<sup>1</sup> This proposition became the basis of that clause of the Constitution which declares that "no preference shall be given by any regulation of commerce or revenue to the ports of one state over those of another; nor shall vessels bound to, or from, one state, be obliged to enter, clear, or pay duties in another."<sup>2</sup>

It was while this subject of the equal operation of the commercial and revenue powers upon the different states was under consideration that the further provision was devised and incorporated into the Constitution, which requires all duties, imposts, and excises to be uniform throughout the United States. This clause, in the final revision of the instrument, was annexed to the power of taxation.<sup>3</sup>

The commercial power, besides being subjected to the restrictions which have been thus described, was extended to a subject not embraced in it by the report of the committee of detail. They had included in it "commerce with foreign nations, and among the several states"—meaning, by the former term, not to include the Indian tribes upon this continent, but all other communities, civilized and barbarian, foreign to the people of the United States. By the system which had always prevailed in the relations of Europeans and their descendants with the Indians of America,

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<sup>1</sup> Elliot, V. 478, 479.

<sup>2</sup> Constitution, Art. I. § 9. See the proceedings which took place on the proposition of the Maryland delegates. Elliot, V. 478, 479, 483, 502, 545.

<sup>3</sup> Elliot, V. 543. Constitution, Art. I. § 8, clause 1.

those tribes had constantly been regarded as distinct and independent political communities, retaining their original rights, and among them the undisputed possession of the soil; subject to the exclusive right of the European nation making the first discovery of their territory to purchase it. This principle, incorporated into the public law of Europe at the time of the discovery and settlement of the New World, and practised by general consent of the nations of Europe, was the basis of all the relations maintained with the Indian tribes by the imperial government, in the time of our colonial state, by our Revolutionary Congress, and by the United States under the Confederation. It recognized the Indian tribes as nations, but as nations peculiarly situated, inasmuch as their intercourse and their power to dispose of their landed possessions were restricted to the first discoverers of their territory. This peculiar condition drew after it two consequences—first, that, as they were distinct nations, they could not be treated as part of the subjects of any one of the states, or of the United States; and, secondly, that, as their intercourse and trade were subjected to restraint, that restraint would be most appropriately exercised by the federal power. So general was the acquiescence in these necessities imposed by the principle of public law which defined the condition of the Indian tribes, that during the whole of the thirteen years which elapsed from the commencement of the Revolution to the adoption of the Constitution, the regulation of intercourse with those tribes was left to the federal authority. It was tacitly assumed by the Revolutionary Congress, and it was expressly conferred by the Articles of Confederation.

The provision of the Confederation on this subject gave to the United States the exclusive right and power “of regulating the trade and managing all affairs with the Indians not members of any of the states, provided that the legislative right of any state within its own limits be not infringed or violated.” The exception of such Indians as were members of any state, referred to those broken members of tribes who had lost their nationality, and had become absorbed as individuals into the political community of the whites. With all other Indians, remaining as distinct and self-governing communities, trade and intercourse were subject to the regulation of Congress; while at the same time



each state retained to itself the regulation of its commerce with all other nations. The broad distinction thus early established, and thus perpetuated in the Confederation, between commerce with the Indian tribes and commerce with "foreign nations," explains the origin and introduction of a special provision for the former, as distinguished from the latter, in the Constitution of the United States.

For although there might have been some reason to contend that commerce with "foreign nations"—if the grant of the commercial power had not expressly embraced the Indian tribes—would have extended to those tribes, as nations foreign to the United States, yet the entire history of the country, and the peculiarity of the intercourse needful for their security, made it eminently expedient that there should be a distinct recognition of the Indian communities, in order that the power of Congress to regulate all commerce with them might not only be as ample as that relating to foreign nations, but might stand upon a distinct assertion of their condition as *tribes*. Accordingly, Mr. Madison introduced the separate proposition "to regulate affairs with the Indians, as well within as without the limits of the United States;"<sup>1</sup> and the committee to whom it was referred gave effect to it, by adding the words, "and with the Indian tribes," to the end of the clause containing the grant of the commercial power.<sup>2</sup>

The remaining powers of Congress may be considered in the order in which they were acted upon by the Convention. The powers to establish a uniform rule of naturalization, to coin money and regulate the value thereof and of foreign coin, and fix the standard of weights and measures, were adopted without discussion and with entire unanimity, as they had been proposed in the draft prepared by the committee of detail. The power to establish post-offices was extended to embrace post-roads.<sup>3</sup>

These were succeeded by the subject of borrowing money and emitting bills on the credit of the United States; a power that was proposed to be given by the committee of detail, while they at the same time proposed to restrain the states from emitting bills of credit. I have not been able to discover upon what

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<sup>1</sup> Elliot, V. 489.    <sup>2</sup> Ibid., 506, 507.    <sup>3</sup> Ibid., 484.    Journal, Elliot, I. 245.

ground it was supposed to be proper or expedient to confer a power of emitting bills of credit on the United States, and to prohibit the states from doing the same thing. That the same thing was in contemplation in the two provisions reported by the committee sufficiently appears from the debates and from the history of the times. The object of the prohibition on the states was to prevent the issue and circulation of paper money; the object of the proposed grant of power to the United States was to enable the government to employ a paper currency when it should have occasion to do so. But the records of the discussions that have come down to us do not disclose the reasons which may have led to the supposition that a paper currency could be used by the United States with any more propriety or safety than by a state. One of the principal causes which had led to the experiment of making a national government with power to prevent such abuses had been the frauds and injustice perpetrated by the states in their issues of paper money; and there was at this very time a loud and general outcry against the conduct of the people of Rhode Island, who kept themselves aloof from the national Convention for the express purpose, among others, of retaining to themselves the power to issue such a currency.

It is possible that the phrase "emit bills on the credit of the United States" might have been left in the Constitution without any other danger than the hazards of a doubtful construction, which would have confined its meaning to the issuing of certificates of debt under the power to "borrow money." But this was not the sense in which the term "bills of credit" was generally received throughout the country, nor the sense intended to be given to it in the clause which contained the prohibition on the states. The well-understood meaning of the term had reference to paper issues intended to circulate as currency, and bearing the public promise to pay a sum of money at a future time, whether made or not made a legal tender in payment of debts. It would have been of no avail, therefore, to have added a prohibition against making such bills a legal tender. If a power to issue them should once be seen in the Constitution, or should be suspected by the people to be there, wrapped in the power of borrowing money, the instrument would array against itself a formidable and probably a fatal opposition. It was deemed wiser, therefore, even if unfore-

seen emergencies might in some cases make the exercise of such a power useful, to withhold it altogether. It was accordingly stricken out by a vote of nine states against two, and the authority of Congress was thus confined to borrowing money on the credit of the United States, which appears to have been intended to include the issuing of government notes not transferable as currency.<sup>1</sup>

The clauses which authorize Congress to constitute tribunals inferior to the Supreme Court,<sup>2</sup> and to make rules as to captures on land and water<sup>3</sup>—the latter comprehending the grant of the entire prize jurisdiction—were assented to without discussion.<sup>4</sup> Then came the consideration of the criminal jurisdiction in admiralty, and that over offences against the law of nations. The committee of detail had authorized Congress “to declare the law and punishment of piracies and felonies committed on the high seas, . . . and of offences against the law of nations.” The expression to “declare the law,” etc., was changed to the words “define and punish,” for the following reason. Piracy is an offence defined by the law of nations, and also by the common law of England. But in those codes a single crime only is designated by that term.<sup>5</sup> It was necessary that Congress should have the power to declare whether this definition was to be adopted, and also to determine whether any other crimes should constitute piracy. In the same way the term “felony” has a particular meaning in the common law, and it had in the laws of the different states of the Union a somewhat various meaning. It was necessary that Congress should have the power to adopt any definition of this term, and also to determine what other crimes should be deemed felonies. So, also, there were various offences known to the law of nations, and generally regarded as such by civilized states. But before Congress could have power to punish for any of those offences it would be necessary that they, as the legislative organ of the nation, should determine and make known what acts were to be regarded as offences against the law of nations; and that the power to do this should include both the power to adopt from the code of public

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<sup>1</sup> See the debate, and Mr. Madison's explanation of his vote, Elliot, V. 434, 435, and the note on the latter page.

<sup>2</sup> Constitution, Art. I. § 8, clause 9.    <sup>3</sup> Ibid., clause 11.    <sup>4</sup> Elliot, V. 436.

<sup>5</sup> That is to say, it is the same crime, committed on the high seas, that is denominated robbery when committed on the land.

law offences already defined by that code, and to extend the definition to other acts. The term "declare" was therefore adopted expressly with a view to the ascertaining and creating of offences which were to be treated as piracies and felonies committed on the high seas, and as offences against the law of nations.<sup>1</sup>

The same necessity for an authority to prescribe a previous definition of the crime of counterfeiting the securities and current coin of the United States would seem to have been felt; and it was probably intended to be given by the terms "to provide for the punishment of" such counterfeiting.<sup>2</sup>

The power to "declare" war had been reported by the committee as a power to "make" war. There was a very general acquiescence in the propriety of vesting the war power in the legislature rather than the executive; but the former expression was substituted in place of the latter, in order, as it would seem, to signify that the legislature alone were to determine formally the state of war, but that the executive might be able to repel sudden attacks.<sup>3</sup> The clause which enables Congress to grant "letters of marque and reprisal" was added to the war power, at a subsequent period, on the recommendation of a committee to whom were referred sundry propositions introduced by Charles Pinckney, of which this was one.<sup>4</sup>

In addition to the war power, which would seem to involve of itself the authority to raise all the necessary forces required by the exigencies of a war, the committee of detail had given the separate power "to raise armies," which the Convention enlarged by adding the term to "support."<sup>5</sup> This embraced standing armies in time of peace, and, as the clause thus amended would obviously allow, such armies might be enlarged to any extent and continued for any time. The nature of the government, and the liberties and the very prejudices of the people, required that some check should be introduced to prevent an abuse of this power. A

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<sup>1</sup> Madison, Elliot, V. 436, 437.

<sup>2</sup> In the clause as it passed the Convention, the offence of *counterfeiting* was placed with the other crimes which Congress was to "define" and "punish;" but, on the revision of the Constitution, counterfeiting was placed in a separate clause, under the term "to provide for the punishment of," etc. See Art. I. § 8, clauses 6, 10.

<sup>3</sup> Elliot, V. 438, 439.

<sup>4</sup> Ibid., 440, 510, 511.

<sup>5</sup> Ibid., 442.

limitation of the number of troops that Congress might keep up in time of peace was proposed, but it was rejected by all the states as inexpedient and impracticable.<sup>1</sup> Another check, capable of being adapted to the proper exercise of the power itself, was to be found in an idea suggested by Mr. Mason, of preventing a perpetual revenue.<sup>2</sup> The application of this principle to the power of raising and supporting armies would furnish a salutary limitation, by requiring the appropriations for this purpose to pass frequently under the review of the representatives of the people, without embarrassing the exercise of the power itself. Accordingly, the clause now in the Constitution, which restricts the appropriation of money to the support of the army to a term not longer than two years, was added to the power of raising and supporting armies.<sup>3</sup>

Authority "to provide and maintain a navy" was unanimously agreed as the most convenient definition of the power, and to this was added, from the Articles of Confederation, the power "to make rules for the government and regulation of the land and naval forces."<sup>4</sup>

The next subject which required consideration was the power of the general government over the militia of the states. There were few subjects dealt with by the framers of the Constitution exceeding this in magnitude, in importance, and delicacy. It involved not only the relations of the general government to the states and the people of the states, but the question whether and how far the whole effective force of the nation could be employed for national purposes and directed to the accomplishment of objects of national concern. The mode in which this question should be settled would determine, in a great degree, and for all time, whether the national power was to depend, for the discharge of its various duties in peace and in war, upon standing armies, or whether it could also employ and rely upon that great reservation of force that exists in all countries accustomed to enroll and train their private citizens to the use of arms.

The American Revolution had displayed nothing more conspicuously than the fact that, while the militia of the states were in general neither deficient in personal courage nor incapable of

<sup>1</sup> Elliot, V. 443.

<sup>2</sup> Ibid., 440.

<sup>3</sup> Elliot, V. 510, 511. Constitution, Art. I. § 8, clause 12.

<sup>4</sup> Elliot, V. 443.

being made soldiers, they were inefficient and unreliable as troops. One of the principal reasons for this was that, when called into the field in the service of the federal power, the different corps of the several states looked up to their own local government as their sovereign ; and being amenable to no law but that of their own state, they were frequently indisposed to recognize any other authority. But a far more powerful cause of their inefficiency lay in the fact that they were not disciplined or organized or armed upon any uniform system. A regiment of militia drawn from New Hampshire was a very different body from one drawn from New York, or Pennsylvania, or New Jersey, or South Carolina. The consequence was that, when these different forces were brought to act together, there were often found in the same campaign, and sometimes in the same engagement, portions of them in a very respectable state of discipline and equipment, and others in no state of discipline or equipment at all.

The necessity, therefore, for a uniform system of disciplining and arming the militia was a thing well ascertained and understood at the time of the formation of the Constitution. But the control of this whole subject was a part of the sovereignty of each state, not likely to be surrendered without great jealousy and distrust ; and one of the most delicate of the tasks imposed upon the Convention was that of determining how far and for what purposes the people of the several states should be asked to confer upon the general government this very important part of their political sovereignty. One thing, however, was clear : that, if the general government was to be charged with the duty of undertaking the common defence against an external enemy, or of suppressing insurrection, or of protecting the republican character of the state constitutions, it must either maintain at all times a regular army suitable for any such emergency, or it must have some power to employ the militia. The latter, when compared with the resource of standing armies is, as was said of the institution of chivalry, "the cheap defence of nations ;" and although no nation has found, or will be likely to find it sufficient without the maintenance of some regular troops, the nature of the liberties inherent in the construction of the American governments, and the whole current of the feelings of the American people, would lead them to the adoption of a policy that might

restrain, rather than encourage, the growth of a permanent army. So far, therefore, it seemed manifest, from the duties which were to be imposed on the government of the Union, that it must have a power to employ the militia of the states; and this would of necessity draw after it, if it was to be capable of a beneficial exercise, the power to regulate, to some extent, their organization, armament, and discipline.

But the first draft of the Constitution, prepared by the committee of detail, contained no express power on this subject, excepting "to call forth the aid of the militia in order to execute the laws of the Union, enforce treaties, suppress insurrections, and repel invasions."<sup>1</sup> Possibly it might have been contended, after the Constitution had gone into operation, that the general power to make all laws necessary and proper for the execution of the powers specially enumerated would enable Congress to prescribe regulations of the force which they were authorized to employ, since the authority to employ would seem to involve the right to have the force kept in a state fit to be employed. But this would have been a remote implication of power, too hazardous to be trusted; and it at once occurred to one of the wisest and most sagacious of the statesmen composing the Convention, who, though he never signed the Constitution, exercised a great and salutary influence in its preparation—Mr. Mason of Virginia—that an express and unequivocal power of regulating the militia must be conferred. He stated the obvious truth that, if the disciplining of the militia were left in the hands of the states, they never would concur in any one system; and as it might be difficult to persuade them to give up their power over the whole, he was at first disposed to adopt the plan of placing a part of the militia under the control of the general government, as a select force.\* But he, as well as others, became satisfied that this plan would not produce a uniformity of discipline throughout the entire mass of the militia. The question, therefore, resolved itself practically into this—what should be the nature and extent of the control to be given to the general government, assuming that its control was to be applicable to the entire militia of the several states. This important question, involved in several distinct propositions,

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<sup>1</sup> Art. VII. § 1 of the first draft. Elliot, V. 379.

\* Ibid., 440.

was referred to a grand committee of the states.<sup>1</sup> It was by them that the plan was digested and arranged by which Congress now has the power to provide for organizing, arming, and disciplining the militia, and for governing such part of them as may be employed in the service of the United States, reserving to the states the appointment of the officers, and the authority of training the militia according to the discipline prescribed by Congress;<sup>2</sup>—a provision that was adopted by a large majority of the states. The clause reported by the committee of detail was also adopted, by which Congress is enabled to provide for calling forth the militia to execute the laws of the Union, suppress insurrections, and repel invasions.<sup>3</sup>

The next subject in the order of the report made by the committee of detail was that general clause now found at the close of the enumeration of the express powers of Congress, which authorizes them “to make all laws which may be necessary and proper for carrying into execution the foregoing powers, and all other powers vested by this Constitution in the government of the United States, or in any department or officer thereof.”<sup>4</sup> Nothing occurred in the proceedings on this provision which throws any particular light upon its meaning, excepting a proposition to include in it, expressly, the power to “establish all offices” necessary to execute the powers of the Constitution; an addition which was not made, because it was considered to be already implied in the terms of the clause.<sup>5</sup>

The subjects of patents for useful inventions and of copyrights of authors appear to have been brought forward by Mr. Charles Pinckney. They gave rise to no discussion in the Convention, but were considered in a grand committee, with other matters, and there is no account of the views which they took of this interesting branch of the powers of Congress. We know, however, historically, that these were powers not only possessed by all the states, but exercised by some of them, before the Constitution of the United States was formed. Some of the states had general copyright laws, not unlike those which have since been enacted

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<sup>1</sup> August 18th. Elliot, V. 445.

<sup>2</sup> Constitution, Art. I. § 8, cl. 16. Ibid., p. 467.

<sup>3</sup> Constitution, Art. I. § 8, cl. 18.

<sup>4</sup> Art. I. § 8, cl. 15.

<sup>5</sup> Elliot, V. 447.



by Congress;<sup>1</sup> but patents for useful inventions were granted by special acts of legislation in each case. When the power to legislate on these subjects was surrendered by the states to the general government, it was surrendered as a power to legislate for the purpose of securing a natural right to the fruits of mental labor. This was the view of it taken in the previous legislation of the states, by which the power conferred upon Congress must to a large extent be construed.

Such are the legislative powers of Congress, which are to be exercised within the states themselves; and it is at once obvious that they constitute a government of limited authority. The question arises, then, whether that authority is anywhere full and complete, embracing all the powers of government and extending to all the objects of which it can take cognizance. It has already been seen that, when provision was made for the future acquisition of a seat of government, exclusive legislation over the district that might be acquired for that purpose was conferred upon Congress.<sup>2</sup> In the same clause the like authority was given over all places that might be purchased, with the consent of any state legislature, for the erection of forts, magazines, arsenals, dock-yards, and other needful buildings.<sup>3</sup> All the other places to which the authority of the United States can extend are included under the term "territories," which are out of the limits and jurisdiction of any state. As this is a subject which is intimately connected with the power to admit new states into the Union, we are now to consider the origin and history of the authority given to Congress for that purpose.

In examining the powers of Congress contained in the first article of the Constitution, the reader will not find any power to admit new states into the Union; and while he will find there the full legislative authority to govern the District of Columbia and certain other places ceded to the United States for particular purposes, of which I have already spoken, he will find no such authority there conferred in relation to the territory which had become the property of the United States by the cession of certain

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<sup>1</sup> See the statutes of Massachusetts and Connecticut, etc., cited in Curtis on Copyright, pp. 77, 78, 79.

<sup>2</sup> Ante, Chap. XXV.

<sup>3</sup> Elliot, V. 510, 511, 512.

of the states before and after the adoption of the Articles of Confederation. If this power of legislation exists as to the territories, it is to be looked for in another connection ; and although it is not the special province of this work to discuss questions of construction, it is proper here to state the history of those portions of the Constitution which relate to this branch of the authority of Congress.

I have heretofore given an account of the origin of the Northwestern Territory, of its relations to the Union, and of the mode in which the federal Congress had dealt with it down to the time when the national Convention was assembled. From the sources there referred to, and from others to which reference will now be made, it may be convenient to recapitulate what had been done or attempted by the Congress of the Confederation.

It appears that during the preparation of the Articles of Confederation an effort was made to include in them a grant of express power to the United States in Congress to ascertain and fix the western boundaries of the existing states, and to lay out the territory beyond the boundaries that were to be thus ascertained into new states. This effort totally failed. It was founded upon the idea that the land beyond the rightful boundaries of the old states was already, or would by the proposed grant of power to ascertain those boundaries become, the common property of the Union. But the states which then claimed an uncertain extension westward from their actual settlements were not prepared for such an admission or such a grant ; and, accordingly, the Articles of Confederation, which were framed in 1777 and took effect in 1781, contained no express power to deal with landed property of the United States, and no provision which could safely be construed into a power to form and admit new states out of then unoccupied lands anywhere upon the continent. Still, the articles were successively ratified by some of the states, and finally became established, in the express contemplation that the United States should be made the proprietor of such lands by the cession of the states which claimed to hold them. In order to procure such cessions, as the means of inducing a unanimous accession to the Confederacy, the Congress, in 1780, passed a resolve, in which they promised to dispose of the lands for the common benefit of the United States, to settle and form them into distinct republican states, and

to admit such states into the Union on an equal footing with its present members.<sup>1</sup> The great cession by Virginia, made in 1784, was immediately followed by another resolve, for the regulation of the territory thus acquired.<sup>2</sup>

This resolve, as originally reported by Mr. Jefferson, embraced a plan for the organization of temporary governments in certain states which it undertook to describe and lay out in the western territory, and for the admission of those states into the Union. In one particular, also, it undertook, as it was first reported, to regulate the personal rights or relations of the settlers by providing that, after the year 1800, slavery, or involuntary servitude except for crime, should not exist in any of the states to be formed in the territory. But this clause was stricken out before the resolve was passed, and its removal left the measure a mere provision for the political organization of temporary and permanent governments of states, and for the admission of such states into the Union. So far as personal rights or relations were involved in it, the settlers were authorized to adopt, for a temporary government, the constitution and laws of any one of the original states, but the laws were to be subject to alteration by their ordinary legislature. The conditions of their admission into the Union referred solely to their political relations to the United States, or to the rights of the latter as the proprietor of the ungranted lands.

In about a year from the passage of this measure introduced by Mr. Jefferson, and after he had gone on his mission to France, an effort was made by Mr. King to legislate on the subject of the immediate and perpetual exclusion of slavery from the states described in Mr. Jefferson's resolve. Mr. King's proposition was referred to a committee, but it does not appear that it was ever acted upon.<sup>3</sup> The cessions of Massachusetts and Connecticut followed, in 1785 and 1786. Within two years from this period, such had been the rapidity of emigration and settlement, and so inconvenient had become the plan of 1784, that Congress felt obliged to legislate anew on the whole subject of the Northwestern Terri-

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<sup>1</sup> Resolve of October 10th, 1780. Journals, VI. 325.

<sup>2</sup> Resolve of April 23d, 1784. Journals, IX. 153.

<sup>3</sup> March 16th, 1785. Journals, X. 79.

tory, and proceeded to frame and adopt the Ordinance of July 13th, 1787. This instrument not only undertook to make political organizations and to provide for the admission of new states into the Union, but it also dealt directly with the rights of individuals. Its exclusion of slavery from the territory is well known as one of its fundamental articles, not subject to alteration by the people of the territory or their legislature.<sup>1</sup>

The power of Congress to deal with the admission of new states was not only denied at the time, but its alleged want of such power was one of the principal reasons which were said to require a revision of the federal system. It does not appear that the subject of legislation on the rights or condition of persons attracted particular attention; nor do we know, from anything that has come down to us, that the clause relating to slavery was stricken from Mr. Jefferson's resolve in 1784 upon the special ground of a want of constitutional power to legislate on such a question. But Mr. Jefferson has himself informed us that a majority of the states in Congress would not consent to construe the Articles of Confederation as if they had reserved to nine states in Congress power to admit new states into the Union from the territorial possessions of the United States; and that they so shaped his measure as to leave the question of power and the rule for voting to be determined when a new state formed in the territory should apply for admission. It seems, also, that although the power to frame territorial governments, to organize states and admit them into the Union, was assumed in the Ordinance of 1787, the Congress of the Confederation never acted upon the power so far as to admit a state.<sup>2</sup> Finally, we are told by Mr. Madison, in the *Federalist*, that all that had been done in the ordinance by the Congress of the Confederation, including the sale of lands, the organization of governments, and the prescribing of conditions of admission into the Union, had been done "without the least color of constitutional authority"<sup>3</sup>—an assertion which, whether justifiable or not, shows

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<sup>1</sup> See the note on the authorship of the Ordinance of 1787, in the Appendix to this volume.

<sup>2</sup> See the proceedings concerning Kentucky, in 1788. *Journals*, XIII. 16, 32, 51, 52, 55.

<sup>3</sup> The *Federalist*, No. 38.

that the power of legislation was by some persons strenuously denied.<sup>1</sup>

With regard to the powers of Congress, under the Confederation, to erect new states in the Northwestern Territory, and to admit them into the Union, the truth seems to be this: There is no part of the Articles of Confederation which can be said to confer such a power; and, in fact, when the articles were framed the Union, although it then existed by an imperfect bond, not only possessed no such territory, but it did not then appear likely to become the proprietor of lands claimed by certain of the states as the successors of the crown of Great Britain, and lying within what they regarded as their original chartered limits. The refusal of those states to allow the United States to determine their boundaries made it unnecessary to provide for the exercise of authority over a public domain. But in the interval between the preparation of the articles and their final ratification a great change took place in the position of the Union. It was found that certain of the smaller states would not become parties to the Confederation if the great states were to persist in their refusal to cede to the Union their claims to the unoccupied western lands; and although the states which thus held themselves back for a long time from the ratification of the articles finally adopted them before the cessions of western territory were made, they did so upon the most solemn assertion that they expected and confided in a future relinquishment of their claims by the other states. Those just expectations were fulfilled. By the acts of cession and by the proceedings of Congress which invited them, the United States not only became the proprietors of a great public domain, but they received that domain upon the express trust that its lands should be disposed of for the common benefit, and that the country should be settled and formed into republican states, and that those states

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<sup>1</sup> The passage quoted from Mr. Jefferson, ante, also shows that strong doubts were felt in Congress, in 1784, respecting their power to admit new states formed out of unoccupied territory. Indeed, the whole of the proceedings upon Mr. Jefferson's measure of April 23d, 1784, show that the powers of Congress over the territory that had been acquired under the cession of Virginia were very variously regarded by the different delegates. See Journals, IX. 138-156. The state of South Carolina voted against the resolve on its final passage, and after it had been modified to meet some of the objections raised.

should be admitted into the Union. In these conveyances, made and accepted upon these trusts, there was a unanimous acquiescence by the states.

While, therefore, in the formal instrument under which the Congress was organized, and by which the United States became a corporate body, there was no article which looked to the admission of new states into that body, formed out of territory thus acquired, and no power was conferred to dispose of such lands or govern such territory, there were, outside of that instrument, and closely collateral to it, certain great compacts between the states, arising out of deeds of cession and the formal guarantees by which those cessions had been invited, and with which they had been received, which proceeded as if there were a competent authority in the United States in Congress to provide for the formation of the states contemplated, and for their admission into the Union. Strictly speaking, however, there was no such authority. It was to be gathered, if at all, from public acts and general acquiescence, and could not be found in the instrument that formed the charter and established the powers of the Congress. It was an authority, therefore, liable to be doubted and denied; it was one for the exercise of which the Congress was neither well fitted nor well situated; and it was moreover so delicate, so extensive, and so different from all the other powers and duties of the government, as to make it eminently necessary to have it expressly stated and conferred in the instrument under which all the other functions of the government were to be exercised.<sup>1</sup>

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<sup>1</sup> I think we are to understand Mr. Madison's assertion in the *Federalist*—that what had been done by Congress in relation to the Northwestern Territory was without constitutional authority—to mean that it had been done without the authority of any proper constitutional provision. Mr. Madison himself, being a member of Congress in 1783, voted for the acceptance of a report, by the adoption of which Congress settled the conditions on which the cession of Virginia was to be received by the United States. These conditions embraced the whole of the three fundamental points, that the territory should be held and disposed of for the common benefit of the United States, that it should be divided into states, and that those states should be admitted into the Union. So that Mr. Madison was a party to the arrangement by which Congress undertook to hold out these promises to the states. (*Journals of Congress for September 18th, 1783, VIII. 355–359.*) But he was not a member of Congress in 1784, when Mr. Jefferson's measure was adopted; and although he was a member in 1787, when

Such was the state of things at the period of the formation of the Constitution; and as we are to look for the germ of every power embraced in that instrument in some stage of the proceedings which took place in the course of its preparation, it is important at once to resort to the first suggestion of any authority over these subjects. In doing so we are to remember that the United States had accepted cessions of the Northwestern Territory impressed with two distinct trusts: first, that the country should be settled and formed into distinct republican states, which should be admitted into the Union; secondly, that the lands should be disposed of for the common benefit of all the states.<sup>1</sup>

Accordingly we find in the plan of government presented by Governor Randolph at the opening of the Convention a resolution declaring "that provision ought to be made for the admission of states lawfully arising within the limits of the United States, whether from a voluntary junction of government and territory or otherwise, with the consent of a number of voices in the national legislature less than the whole."<sup>2</sup> This resolution remained the same in phraseology and in purpose through all the stages to which the several propositions that formed the outline of the new government were subjected, down to the time when they were sent to the committee of detail for the purpose of having the Constitution drawn out. Looking to the manifest want of power in the Confederation to admit new states into the Union; to the probability that Vermont, Kentucky, Tennessee (then called Franklin), and Maine—none of which were embraced in any cessions that had then been made to the United States—might become separate states; and to the prospective legislation of the Ordinance of 1787 concerning the admission of states that were to be formed

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the ordinance was adopted, he was at that time in attendance upon the national Convention, and consequently never voted upon the ordinance. His participation in the proceedings of the Convention, by which the necessary power was created, shows his sense of its necessity.

<sup>1</sup> See especially the cession by Virginia, of March 1st, 1784. Journals of Congress, IX. 67. Cession by Massachusetts, April 19th, 1785. Journals, X. 128. Cession by Connecticut, September 13th, 1786. Journals, XI. 221. Also the resolve of Congress passed, in anticipation of these cessions, October 10th, 1780. Journals VI. 825.

<sup>2</sup> Resolution 10. Madison, Elliot, V. 128.

in the territory northwest of the Ohio, which had been ceded to the Union, it seems quite certain that the purpose of the resolution was to supply a power to admit new states, whether formed from the territory of one of the existing states, or from territory that had become the exclusive property of the United States. The resolution contained, however, no positive restriction which would require the assent of any existing state to the separation of a part of its territory; but as the states to be admitted were to be those "lawfully arising," it is apparent that the original intention was that no present state should be dismembered without its consent. But in order to make this the more certain, the committee of detail, in the article in which they carried out the resolution, gave effect to its provisions in these words: "New states lawfully constituted or established within the limits of the United States may be admitted, by the legislature, into this government; but to such admission the consent of two thirds of the members present in each house shall be necessary. If a new state shall arise within the limits of any of the present states, the consent of the legislatures of such states shall be also necessary to its admission. If the admission be consented to, the new states shall be admitted on the same terms with the original states. But the legislature may make conditions with the new states concerning the public debt which shall be then subsisting."<sup>1</sup>

In the first draft of the Constitution, therefore, there was contained a qualified power to admit new states, whether arising within the limits of any of the old states, or within the territory of the United States. But in this proposition there was a great omission; for although the states to be admitted were to be those lawfully arising, and such a state might be formed out of the territory of an existing state by the legislative power of the latter, yet it was not ascertained how a state was "lawfully to arise" in the territory of the United States. Nor was there, at present, any provision introduced into the Constitution by which Congress could dispose of the soil of the national domain. These as well as other omissions at once attracted the attention of Mr. Madison, who, as we have seen, held the opinion that the entire legislation of the old Congress in reference to the Northwestern Territory

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<sup>1</sup> Art. XVII. of the draft prepared by the committee of detail. Elliot, V. 381.



was without constitutional authority. Before the article which embraced the admission of new states was reached, he moved the following among other powers: <sup>1</sup> "to dispose of the unappropriated lands of the United States;" and "to institute temporary governments for new states arising therein." These propositions were referred to the committee of detail, but before any action upon them the article previously reported by that committee was reached and taken up, and there ensued upon it a course of proceeding which resulted in the provisions that now stand in the third section of the fourth article of the Constitution.<sup>2</sup>

The first alteration made in the article reported by the committee was to strike out the clause which declared that the new states should be admitted on an equal footing with the old ones. The reason assigned for this change was, that the legislature ought not to be tied down to such an admission, as it might throw the balance of power into the Western States.<sup>3</sup> The next modification was to strike out the clause which required a vote of two thirds of the members present for the admission of a state.<sup>4</sup> This left the proposed article a mere grant of power to admit new states, requiring the consent of the legislature of any state that might be dismembered, as well as the consent of Congress. An earnest effort was then made, by some of the members from the smaller states, to remove this restriction, upon the ground that the United States, by the treaty of peace with England, had become the proprietor of the crown lands which were situated within the limits claimed by some of the states that would be likely to be divided; and it was urged that to require the consent of Virginia, North Carolina, and Georgia to the separation of their western settlements might give those states an improper control over the title of the United States to the vacant lands lying within the jurisdiction claimed by those states, and would enable them to retain the jurisdiction unjustly, against the wish of the settlers. But a large majority of the states refused to concede a power to dismember a state, without its consent, by taking away even its claims to jurisdiction. It was considered by them that, as to municipal jurisdiction over settlements already made within limits claimed by

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<sup>1</sup> August 18th. Elliot, V. 439.

<sup>2</sup> Ibid., 492, 493.

<sup>3</sup> August 29th. Elliot, V. 492-497.

<sup>4</sup> Ibid., 493.

Virginia, North Carolina, and Georgia, the Constitution ought not to interfere, without the joint consent of the settlers and the state exercising such jurisdiction; that if the title to lands unoccupied at the treaty of peace, lying within the originally chartered limits of any of the states, was in dispute between them and the United States, that controversy would be within the reach of the judicial power, as one between a state and the United States, or it might be terminated by a voluntary cession of the state claim to the Union.<sup>1</sup>

The next step taken in the settlement of this subject was to provide for the case of Vermont, which was then in the exercise of an independent sovereignty, although it was within the asserted limits of New York. It was thought proper, in this particular case, not to make the state of Vermont, already formed, dependent for her admission into the Union on the consent of New York. For this reason the words "hereafter formed" were inserted in the article under consideration, and the word "jurisdiction" was substituted for "limits."<sup>2</sup> Thus modified, the article stood as follows:

"New states may be admitted by the legislature into the Union; but no new state shall be hereafter formed or erected within the jurisdiction of any of the present states without the consent of the legislature of such state, as well as of the general legislature."

This provision was quite unsatisfactory to the minority. They wished to have the Constitution assert a distinct power in Congress to erect new states within, as well as without, the territory claimed by any of the states, and to admit such new states into the Union; and they also wished for a saving clause to protect the title of the United States to vacant lands ceded by the treaty of peace. Luther Martin accordingly moved a substitute article, embracing these two objects, but it was rejected.<sup>3</sup> A clause was then added to the article pending, which declared that no state should be formed by the junction of two or more states, or parts of states,

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<sup>1</sup> See the vote on a proposition moved by Mr. Carroll for a recommitment for the purpose of asserting in the Constitution the right of the United States to the lands ceded by Great Britain in the treaty of peace. New Jersey, Delaware, and Maryland alone voted for the recommitment. Elliot, V. 493, 494.

<sup>2</sup> Elliot, V. 495.

<sup>3</sup> Ibid., 496. New Jersey, Delaware, and Maryland, *ay*.

without the consent of the states concerned, as well as the consent of Congress. This completed the substance of what is now the first clause of the third section of the fourth article of the Constitution.<sup>1</sup>

Mr. Carroll thereupon renewed the effort to introduce a clause saving the rights of the United States to vacant lands; and after some modification he finally submitted it in these words: "Nothing in this Constitution shall be construed to alter the claims of the United States, or of the individual states, to the western territory; but all such claims shall be examined into, and decided upon, by the Supreme Court of the United States." Before any vote was taken upon this proposition, however, Gouverneur Morris moved to postpone it, and brought forward as a substitute the very provision which now forms the second clause of the third section of article fourth, which he presented as follows: "The legislature shall have power to dispose of, and make all needful rules and regulations respecting, the territory or other property belonging to the United States; and nothing in this Constitution contained shall be so construed as to prejudice any claims, either of the United States or of any particular state." This provision was adopted, without any other dissenting vote than that of the state of Maryland.<sup>2</sup>

The purpose of this provision, as it existed at the time in the minds of the framers of the Constitution, must be gathered from the whole course of their proceedings with respect to it, and from the surrounding facts, which exhibit what was then, and what was afterwards likely to become, the situation of the United States in reference to the acquisition of territory and the admission of new states. There were, then, at the time when this provision was made, four classes of cases in the contemplation of the Convention. The first consisted of the Northwestern Territory, in which the title to the soil and the political jurisdiction were already vested in the United States. The second embraced the case of

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<sup>1</sup> When the Constitution was finally revised, the word "hereafter" was left out of the first clause of the third section of article fourth, apparently because the phraseology of the clause was sufficient without it, to save the case of Vermont, which was regarded as not being within the "*jurisdiction*," although it was within the asserted *limits*, of the state of New York.

<sup>2</sup> Elliot, V. 496, 497.

Vermont, which was then exercising an independent jurisdiction adversely to the state of New York, and the case of Kentucky, then a district under the jurisdiction of Virginia; in both of which the United States neither claimed nor sought to acquire either the title to the vacant lands or the rights of political sovereignty, but which would both require to be received as new and separate states, the former without the consent of New York, the latter with the consent of Virginia. The third class comprehended the cessions which the United States in Congress were then endeavoring to obtain from the states of North Carolina, South Carolina, and Georgia, and in which were afterwards established the states of Tennessee, Mississippi, and Alabama.<sup>1</sup> These cessions, as it then appeared, might or might not all be made. If made, the title of the United States to the unoccupied lands would be complete, resting both upon the cessions and upon the treaty of peace with England; and the political jurisdiction over the existing settlements, as well as over the whole territory, would be transferred with the cessions, subject to any conditions which the ceding states might annex to their grants. If the cessions should not be made, the claims of the United States to the unoccupied lands would stand upon the treaty of peace, and would require to be saved by some clause in the Constitution which should signify that they were not surrendered; while the claims of the respective states would require to be protected in like manner.

The reader will now be prepared to understand the following explanation of the third section of the fourth article of the Constitution. First, with reference to the Northwestern Territory, the soil and jurisdiction of which was already completely vested in

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<sup>1</sup> The cession by South Carolina of all its "right, title, interest, jurisdiction, and claim" to the "territory or tract of country" lying, within certain northern and southern limits, between the western boundary of that state and the river Mississippi, was in fact made and accepted in Congress, August 9th-10th, 1787, twenty days before the territorial clause was finally settled in the Convention, which took place August 30th. (*Journals of the Old Congress*, XII. 129-130. Madison, Elliot, V. 494-497.) On the 20th of October of the same year the Congress passed a resolution urging the states of North Carolina and Georgia to cede their western claims. This request was not complied with until after the Constitution had gone into operation. The cession of North Carolina was made February 25th, 1790; that of Georgia, April 24th, 1802.

the United States, it was necessary that the Constitution should confer upon Congress power to exercise the political jurisdiction of the United States, power to dispose of the soil, and power to admit new states that might be formed there into the Union. Secondly, with reference to such cases as that of Vermont, it was necessary that there should be a power to admit new states into the Union without requiring the assent of any other state, when such new states were not formed within the actual jurisdiction of any other state. Thirdly, with reference to such cases as that of Kentucky, which would be formed within the actual jurisdiction of another state, it was necessary that the power to admit should be qualified by the condition of the consent of that state. Fourthly, with reference to such cessions as were expected to be made by North Carolina, South Carolina, and Georgia, it was necessary to provide the power of political government, the power to admit into the Union, and the power to dispose of the soil, if the cessions should be made; and at the same time to save the claims of the United States and of the respective states as they then stood, if the cessions anticipated should not be made. None of these cases, however, were specifically mentioned in the Constitution, but general provisions were made, which were adapted to meet the several aspects of these cases. From the generality of these provisions, it is held by some that the clause which relates to "the territory or other property of the United States," was intended to be applied to all cessions of territory that might ever be made to the United States, as well as to those which had been made, or which were then specially anticipated; while others give to the clause a much narrower application.

There now remain to be considered the restraints imposed upon the exercise of the powers of Congress, both within the states and in all other places; both where the authority of the United States is limited to certain special objects, and where it is unlimited and universal, excepting so far as it is narrowed by these constitutional restraints. Some of them I have already described, in tracing the manner in which they were introduced into the Constitution. We have seen how far the commercial and revenue powers became limited in respect to the slave-trade, to taxes on exports, to preferences between the ports of different states, and to the levying of capitation or other direct taxes. These restrictions were applica-

ble to these special powers. But others were introduced which apply to the exercise of all the powers of Congress, and are in the nature of limitations upon its general authority as a government.

One of these is embraced in the provision "that the privilege of the writ of habeas corpus shall not be suspended, unless when, in cases of rebellion or invasion, the public safety may require it."<sup>1</sup> The common law of England, which recognizes the right to the writ of habeas corpus for the purpose of delivery from illegal imprisonment or restraint, was the law of each of the American states; and it appears from the proceedings of the Convention to have been the purpose of this provision to recognize this right, in the relations of the people of the states to the general government, and to secure and regulate it. The choice lay between a declaration of the existence of the right, making it inviolable and absolute, under all circumstances, and a recognition of its existence by a provision which would admit of its being suspended in certain emergencies. The latter course was adopted, although three of the states recorded their votes against the exception of cases of rebellion or invasion.<sup>2</sup>

The prohibition upon Congress to pass bills of attainder, or *ex post facto* laws, came into the Constitution at a late period, and while the first draft of it was under consideration. Bills of attainder, in the jurisprudence of the common law, are acts of legislation inflicting punishment without a judicial trial. The proposal to prohibit them was received in the Convention with unanimous assent. With regard to the other class of legislative acts, described as "*ex post facto* laws," there was some difference of opinion, in consequence probably of different views of the extent of the term. In the common law this expression included only, then and since, laws which punish as crimes acts which were not punishable as crimes when they were committed. Laws of a civil nature, retrospective in their operation upon the civil rights and relations of parties, were not embraced by this term, according to the definition of English jurists. But it is manifest from what

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<sup>1</sup> Constitution, Art. I. § 9, cl. 2.

<sup>2</sup> See Elliot, V. 484. The three states were North Carolina, South Carolina, and Georgia.

was said by different members, that, at the time when the vote was taken which introduced this clause into the Constitution, the expression "*ex post facto* laws" was taken in its widest sense, embracing all laws retrospective in their operation. It was objected, therefore, that the prohibition was unnecessary, since, upon the first principles of legislation, such laws are void of themselves, without any constitutional declaration that they are so. But experience had proved that, whatever might be the principles of civilians respecting such laws, the state legislatures had passed them, and they had been acted on. A large majority of the Convention determined, therefore, to place this restraint upon the national legislature, and at the time of the vote I think it evident that all retrospective laws, civil as well as criminal, were understood to be included.<sup>1</sup> But when the same restraint came afterwards to be imposed upon the state legislatures, the attention of the assembly was drawn to the distinction between criminal laws and laws relating to civil interests. In order to reach and control retrospective laws operating upon the civil rights of parties, when passed by a state, a special description was employed to designate them, as "laws impairing the obligation of contracts," and the term "*ex post facto* laws" was thus confined to laws creating and punishing criminal offences after the acts had been committed.<sup>2</sup> What is now the settled construction of this term, therefore, is in accordance with the sense in which it was finally intended to be used by the framers of the Constitution before the instrument passed from their hands.

The committee of detail had reported in their draft of the Constitution a clause which restrained the United States from granting any title of nobility. The Convention, for the purpose of preserving all officers of the United States independent of external influence, added to this a provision that no person holding an office of profit or trust under the United States shall, without the consent of Congress, accept of any present, emolument, office, or title, of any kind whatever, from any king, prince, or foreign state.<sup>3</sup>

In addition to the special powers conferred by the Constitution

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<sup>1</sup> Elliot, V. 462, 463.

<sup>2</sup> Ibid., 488.

<sup>3</sup> Ibid., 467. Constitution, Art. I § 9, cl. 8.

upon the national government, it has imposed certain restraints on the political power of the states, which qualify and diminish what would otherwise be the unlimited sovereignty of each of them. These restraints are of two classes: a part of them being designed to remove all obstructions that might be placed by state legislation or action in the way of the appropriate exercise of the powers vested in the United States, and a part of them being intended to assimilate the nature of the state governments to that of the Union, by the application of certain maxims or rules of public policy. These restraints may now be briefly examined, with reference to this classification.

The idea of imposing special restrictions upon the power of the separate states was not expressly embraced in the plan of government described by the resolutions on which the committee of detail were instructed to prepare the instrument of government. Such restrictions, however, were not unknown to the previous theory of the Union. They existed in the Articles of Confederation, where they had been introduced with the same general purpose of withdrawing from the action of the states those objects, which, by the stipulations of that instrument, had been committed to the authority of the United States in Congress. But the inefficacy of those provisions lay in the fact that they were the mere provisions of a theory. The step now proposed to be taken was to superadd to the prohibitions themselves the principle of their supremacy as matters of fundamental law, and to enable the national judiciary to make that supremacy effectual.

Almost all the restraints imposed by the Articles of Confederation upon the states could be removed or relaxed by the consent of the Congress to the doing of what was otherwise prohibited. In the first draft of the Constitution, the committee of detail inserted four absolute prohibitions, which could not be removed by Congress itself. These related to the coining of money, the granting of letters of marque and reprisal, the making of treaties, alliances, and confederations, and the granting of titles of nobility. All the other restraints on the states were to be operative or inoperative, according to the pleasure of Congress.<sup>1</sup> Among these were included bills of credit; laws making other things than specie a

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<sup>1</sup> Articles XII., XIII. of the first draft, Elliot, V. 381.



tender in payment of debts; the laying of imposts or duties on imports; the keeping of troops or ships of war in time of peace; the entering into agreements or compacts with other states, or with foreign powers; and the engaging in war, when not invaded, or in danger of invasion before Congress could be consulted. The enactment of attainder and *ex post facto* laws, and of laws impairing the obligation of contracts, was not prohibited at all.

But when these various subjects came to be regarded more closely, it was perceived that the list of absolute prohibitions must be considerably enlarged. Thus the power of emitting bills of credit, which had been the fruitful source of great evils, must either be taken away entirely, or the contest between the friends and the opponents of paper money would be transferred from the state legislature to Congress, if Congress should be authorized to sanction the exercise of the power. Fears were entertained that an absolute prohibition of paper money would excite the strenuous opposition of its partisans against the Constitution; but it was thought best to take this opportunity to crush it entirely; and accordingly the votes of all the states but two were given to a proposition to prohibit absolutely the issuing of bills of credit.<sup>1</sup> To the same class of legislation belonged the whole of that system of laws by which the states had made a tender of certain other things than coin legal satisfaction of a debt. By placing this class of laws under the ban of a strict prohibition, not to be removed by the consent of Congress in any case, the mischiefs of which they had been a fruitful source would be at once extinguished. This was accordingly done, by unanimous consent.<sup>2</sup>

At this point the kindred topic of the obligation of contracts presented itself to the mind of Rufus King, suggested doubtless by a provision in the ordinance then recently passed by Congress for the government of the Northwestern Territory.<sup>3</sup> The idea of a special restraint on legislative power, for the purpose of ren-

<sup>1</sup> Elliot, V. 484, 485.

<sup>2</sup> Ibid.

<sup>3</sup> The ordinance, which was passed July 13th, was published at length in "The Pennsylvania Herald," a newspaper printed at Philadelphia, on the 25th of July (1787). Mr. King's motion was made August 28th, and is described by Mr. Madison as a motion "to add, in the words used in the ordinance of Congress establishing new states, a prohibition on the states to interfere in private contracts." Elliot, V. 485.

dering inviolate the obligation of contracts, appears to have originated with Nathan Dane, the author of that ordinance. It was not embraced in the resolve of 1784, reported by Mr. Jefferson, which contained the first scheme adopted by Congress for the establishment of new states in the Northwestern Territory; and it first appears in our national legislation in the ordinance of 1787. Its transfer thence into the Constitution of the United States was a measure of obvious expediency, and indeed of clear necessity. In the ordinance Congress had provided a system of fundamental law, intended to be of perpetual obligation, for new communities, whose legislative power was to be moulded by certain original maxims of assumed justice and right. The opportunity thus afforded for shaping the limits of political sovereignty according to the requirements of a preconceived policy enabled the framers of the ordinance to introduce a limitation, which is not only peculiar to American constitutional law, but which, like many features of our institutions, grew out of previous abuses.

In the old states of the Confederacy, from the time when they became self-governing communities, the power of a mere majority had been repeatedly exercised in legislation, without any regard to its effect on the civil rights and remedies of parties to existing contracts. The law of debtor and creditor was not only subjected to constant changes, but the nature of the change depended in many of the states upon the will of the debtor class, who formed the governing majority. So pressing were the evils thus engendered that, when the framers of the ordinance came to provide for the political existence of communities whose institutions they were to dictate, they determined to impose an effectual restraint on legislative power; and they accordingly provided, in terms much more stringent than were afterwards employed in the Constitution, that no law should have effect in the territory which should in any manner whatever interfere with or affect private contracts or engagements previously made.<sup>1</sup>

The framers of the Constitution were not engaged in the same work of creating new political societies, but they were to provide for such surrenders by existing states of their present unquestioned legislative authority as the dictates of sound policy and the evils

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<sup>1</sup> See the clause of the ordinance, cited ante, p. 302, note 3.

of past experience seemed to require. When this subject was first brought forward in the Convention the restriction was made to embrace all retrospective laws bearing upon contracts, which were supposed to be included in the term "*ex post facto* laws." It being ascertained, however, that the latter phrase would not, in its usual acceptation, extend to civil cases, it became necessary to consider how such cases were to be provided for, and how far the prohibition should extend. The provision of the ordinance was regarded as too sweeping; no legislature, it was said, ever did or can altogether avoid some retrospective action upon the civil relations of parties to existing contracts, and to require it would be extremely inconvenient. At length a description was found which embodied the extent to which the prohibition could with propriety be carried. The legislatures of the states were restrained from passing any "law impairing the obligation of contracts;" a provision that has been found amply sufficient, and attended with the most salutary consequences, under the interpretation that has been given to it.<sup>1</sup>

Bills of attainder and *ex post facto* laws, which had not been included in the prohibitions on the states by the committee of detail, were added by the Convention to the list of positive restrictions, which was thus completed.

In the class of conditional prohibitions, or those acts which might be done by the states with the consent of Congress, the committee of detail had placed the laying of "imposts or duties on imports." To this the Convention added "exports," in order to make the restriction applicable both to commodities carried out of and those brought into a state. But this provision, as thus arranged, would obviously make the commercial system extremely complex and inconvenient. On the one hand, the power to lay duties on imports had been conferred upon the general government, for the purposes of revenue, and to leave the states at liberty, with the consent of Congress, to lay additional duties, would subject the same merchandise to separate taxation by two distinct governments. On the other hand, if the states should be deprived of all power to lay duties on exports, they would have no means of defraying the charges of inspecting their own productions. At

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<sup>1</sup> Elliot, V. 485, 488, 545, 546.

the same time it was apparent that, under the guise of inspection laws, if such laws were not to be subject to the revision of Congress, a state situated on the Atlantic, with convenient seaports, could lay heavy burdens upon the productions of other states that might be obliged to pass through those ports to foreign markets. Again, if the states should be deprived of all power to lay duties on imports, they could not encourage their own manufactures; and if allowed to encourage their own manufactures by such state legislation, it must operate not only upon imports from foreign countries, but upon imports from other states of the Union, which would revive all the evils that had flowed from the want of general commercial regulations. To prevent these various mischiefs the Convention adopted three distinct safeguards. They provided, first, by an exception, that the states might, without the consent of Congress, lay such duties and imposts as "may be absolutely necessary for executing their inspection laws;" second, that the net produce of all duties and imposts laid by any state, whether with or without the consent of Congress, shall be for the use of the Treasury of the United States; third, that all such state laws, whether passed with or without the previous consent of Congress, shall be subject to the revision and control of Congress.<sup>1</sup> There is, therefore, a twofold remedy against any oppressive exercise of the state power to lay duties for purposes of inspection. The question whether the particular duties exceed what is absolutely necessary for the execution of an inspection law may be made a judicial question; and in addition to this, the law imposing the inspection duty is at all times subject to the revision and control of Congress. Any tendency to lay duties or imposts for purposes of revenue or protection is checked by the requirement that the net produce of all duties or imposts laid by any state on imports or exports shall be paid over to the United States, and such tendency may moreover be suppressed by Congress at any time, by the exercise of its power of revision and control.

In order to vest the supervision and control of the whole subject of navigation in Congress, it was further provided that no state, without the consent of Congress, shall lay any duty of tonnage. An exception, proposed by some of the Maryland and Vir-

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<sup>1</sup> Elliot, V. 479, 484, 486, 502, 538, 539, 540, 545, 548.

ginia members, with a view to the situation of the Chesapeake Bay, illustrates the object of this provision. They desired that the states might not be restrained from laying duties of tonnage "for the purpose of clearing harbors and erecting light-houses." It was perhaps capable of being contended, that, as the regulation of commerce was already agreed to be vested in the general government, the states were restrained by that general provision from laying tonnage duties. The object of the special restriction was to make this point entirely certain; and the object of the proposed exception was to divide the commercial power, and to give the states a concurrent authority to regulate tonnage for a particular purpose. But a majority of the states considered the regulation of tonnage an essential part of the regulation of trade. They adopted the suggestion of Mr. Madison, that the regulation of commerce was, in its nature, indivisible, and ought to be wholly under one authority. The exception was accordingly rejected.<sup>1</sup>

The same restriction, with the like qualification of the consent of Congress, was applied to the keeping of troops or ships of war in time of peace, entering into agreements or compacts with another state or a foreign power, or engaging in war, unless actually invaded or in such imminent danger as will not admit of delay.<sup>2</sup>

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<sup>1</sup> By a vote of six states against four. Elliot, V. 548.

<sup>2</sup> Elliot, V. 548.

## CHAPTER XXVIII.

### REPORT OF THE COMMITTEE OF DETAIL, CONTINUED.—SUPREMACY OF THE NATIONAL GOVERNMENT.—DEFINITION AND PUNISHMENT OF TREASON.

AMONG the resolutions sent to the committee there were four which had reference to the supremacy of the government of the United States. They declared that it ought to consist of a supreme legislative, executive, and judiciary; that its laws and treaties should be the supreme law of the several states, so far as they related to the states or their citizens and inhabitants, and that the judiciaries of the states should be bound by them, even against their own laws; that the officers of the states, as well as of the United States, should be bound by oath to support the Articles of Union; and that the question of their adoption should be submitted to assemblies of representatives to be expressly chosen by the people of each state under the recommendation of its legislature.<sup>1</sup>

In order to give effect to these precise and stringent directions, the committee of detail introduced into their draft of a constitution a preamble; two articles asserting and providing for the supremacy of the national government; a provision for the oath of officers; and a declaration of the mode in which the instrument was to be ratified.

The preamble of the Constitution, as originally reported by this committee, differed materially from that subsequently framed and adopted. It spoke in the name of the people of the states of New Hampshire, Massachusetts, etc., who were said "to ordain, declare, and establish this Constitution for the government of ourselves and our posterity;" and it stated no special motives for its

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<sup>1</sup> These were the 1st, 7th, 20th, and 21st of the resolutions. Ante, p. 439 et seq., note.

establishment. In this form it was unanimously adopted on the 7th of August. But when, at a subsequent stage, the instrument was sent to another committee for revision of its style and arrangement, the names of the states were stricken out of the preamble, and it was made to read *We, the people of the United States*. This, however, did not change the meaning, for the preamble, by the words "people of the United States," refers to the people of the states. The language thus employed in the preamble has justly been considered as having an important connection with the provisions made for the ratification of the instrument to which it was prefixed.

The articles specially designed to assert and carry out the supremacy of the national government, as they came from the committee, embodied the resolutions on the same subject which had passed the Convention. The only material addition consisted in the qualification that the legislative acts of the United States, which were to be the supreme law, were such as should be made in pursuance of the Constitution. Subsequently the article was so amended as to make the Constitution, the laws passed in pursuance of it, and the treaties of the United States the supreme law of the land, binding upon all judicial officers.<sup>1</sup>

It is a remarkable circumstance that this provision was originally proposed by a very earnest advocate of the rights of the states—Luther Martin. His design, however, was to supply a substitute for a power over state legislation, which had been embraced in the Virginia plan, and which was to be exercised through a negative by the national legislature upon all laws of the states contravening, in their opinion, the Articles of Union or the treaties subsisting under the authority of the Union.<sup>2</sup> The purpose of the substitute was to change a legislative into a judicial power, by transferring from the national legislature to the judiciary the right of determining whether a state law supposed to be in conflict with the Constitution, laws, or treaties of the Union should be inoperative or valid. By extending the obligation to regard the requirements of the national Constitution and laws to the judges of the state tribunals, their supremacy in all the judicatures of the country was secured. This obligation was enforced

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<sup>1</sup> The Constitution, Art. VI. (See Appendix.)

<sup>2</sup> July 17th. Elliot, V. 322.

by the oath or affirmation to support the Constitution of the United States ;<sup>1</sup> and, as we shall see hereafter, lest this security should fail, the final determination of questions of this kind was drawn to the national judiciary, even when they might have originated in a state tribunal.<sup>2</sup>

Closely connected in purpose with these careful provisions was the mode in which the Constitution was to be ratified. The committee of detail had made this the subject of certain articles in the Constitution itself.<sup>3</sup> But the committee of revision afterwards presented certain resolutions in the place of two of those articles, which were adopted by the Convention after the Constitution had been signed ; leaving in the instrument itself nothing but the article which determined the number of states whose adoption should be sufficient for establishing it.<sup>4</sup> These resolutions pursued substantially the mode previously agreed upon, of a transmission of the instrument to Congress, a recommendation by the state legislatures to the people to institute representative assemblies to consider and decide on its adoption, and a notice to Congress of its action by each state assembly so adopting it. The purpose of this form of proceeding, so far as it was connected with the primary authority by which the Constitution was to be enacted, has been already explained.<sup>5</sup>

What then were the meaning and scope of that supremacy which the framers of the Constitution designed to give to the acts of the government which they constructed ?

In seeking an answer to this question it is necessary to recur, as we have constantly been obliged to do, to the nature of the

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<sup>1</sup> The Constitution, Art. VI.

<sup>2</sup> Ibid., Art. III. § 2.

<sup>3</sup> Articles XXI., XXII., XXIII. of their draft. Elliot, V. 381.

<sup>4</sup> The Constitution, Art. VII.

<sup>5</sup> Ante, p. 431 et seq. The resolutions may be found in Elliot, V. 541 (Sept. 13th). But the proceedings on them are not found in Mr. Madison's Minutes, or in the Journal of the Convention. The official record of their unanimous adoption was laid before Congress on the 28th of September, 1787, and it bears date September 17th. It recites the presence in Convention of all the states that attended excepting New York, and in the place of that *state* stands "Mr. Hamilton *from* New York." This record precedes the official letter addressed by the Convention to Congress. See Journals of Congress for September 28th, 1787, Vol. XII. pp. 149-165.



government which the Constitution was made to supersede. In that system the experiment had been tried of a union of states—each possessed of a complete government of its own—which was intended to combine their several energies for the common defence and the promotion of the general welfare. But this combined will of distinct communities, expressed through the action of a common agent, was wholly unable to overcome the adverse will of any of them expressed by another and separate agent, although the objects of the powers bestowed on the Confederacy were carefully stated and sufficiently defined in a public compact. Thus, for example, the treaty-making power was expressly vested in the United States in Congress assembled; but when a treaty had been made, it depended entirely upon the separate pleasure of each state whether it should be executed. If the state governments did not see fit to enforce its provisions upon their own citizens, or thought proper to act against them, there was no remedy, both because the Congress could not legislate to control individuals, and because there was no department clothed with authority to compel individuals to conform their conduct to the requirements of the treaty, and to disregard the opposing will of the state.

This defect was now to be supplied, by giving to the national authority, not only theoretically but practically, a supremacy over the authority of each state. But this was not to be done by annihilating the state governments. The government of every state was to be preserved; and so far as its original powers were not to be transferred to the general government, its authority over its own citizens and within its own territory must, from the nature of political sovereignty, be supreme. There were, therefore, to be two supreme powers in the same country, operating upon the same individuals, and both possessed of the general attributes of sovereignty. In what way, and in what sense, could one of them be made paramount over the other?

It is manifest that there cannot be two supreme powers in the same community, if both are to operate upon the same objects. But there is nothing in the nature of political sovereignty to prevent its powers from being distributed among different agents for different purposes. This is constantly seen under the same government, when its legislative, executive, and judicial powers are exercised through different officers; and in truth, when we come

to the lawgiving power alone, as soon as we separate its objects into different classes, it is obvious that there may be several enacting authorities, and yet each may be supreme over the particular subject committed to it by the fundamental arrangements of society. Supreme laws, emanating from separate authorities, may and do act on different objects without clashing, or they may act on different parts of the same object with perfect harmony. They are inconsistent when they are aimed at each other, or at the same indivisible object.<sup>1</sup> When this takes place one or the other must yield; or, in other terms, one of them ceases to be supreme on the particular occasion. It was the purpose of the framers of the Constitution of the United States to provide a paramount rule that would determine the occasions on which the authority of a state should cease to be supreme, leaving that of the United States unobstructed. Certain conditions were made necessary to the operation of this rule. The state law must conflict with some provision of the Constitution of the United States, or with a law of the United States enacted in pursuance of the constitutional authority of Congress, or with a treaty duly made by the authority of the Union. The operation of this rule constitutes the supremacy of the national government. It was supposed that, by a careful enumeration of the objects to which the national authority was to extend, there would be no uncertainty as to the occasions on which the rule was to apply; and as all other objects were to remain exclusively subject to the authority of the states within their respective territorial limits, the operation of the rule was carefully limited to those occasions.

The highly complex character of a system in which the duties and rights of the citizen are thus governed by distinct sovereignties would seem to render the administration of the central power—surrounded as it is by jealous and vigilant local governments—an exceedingly difficult and delicate task. Its situation is without an exact parallel in any other country in the world. But it possesses the means which no government of a purely federal character has ever enjoyed, of an exact determination by itself of its own powers; because every conflict between its authority and the

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<sup>1</sup> See a speech made by Hamilton in the Convention of New York, Works, II. 402.

authority of a state may be made a judicial question, and as such is to be solved by the judicial department of the nation. This peculiar device has enabled the government of the United States to act successfully and safely. Without it each state must have been left to determine for itself the boundaries between its own powers and those of the Union ; and thus there might have been as many different determinations on the same question as the number of the states. At the same time this very diversity of interpretation would have deprived the general government of all power to enforce, or even to have, an interpretation of its own. Such a confused and chaotic condition had marked the entire history of the Confederation. It was terminated with the existence of that political system by the establishment of the rule which provides for the supremacy of the Constitution of the United States, and by making one final arbiter of all questions arising under it.

By means of this skilful arrangement a government, in which the singular condition is found of separate duties prescribed to the citizen by two distinct sovereignties, has operated with success. That success is to be measured not wholly, or chiefly, by the diversities of opinion on constitutional questions that may from time to time prevail ; nor by the means, aside from the Constitution, that may sometimes have been thought of for counteracting its declared interpretation ; but by the practical efficiency with which the powers of the Union have operated, and the general readiness to acquiesce in the limitations given to those powers by the department in which their construction is vested. This general acquiescence has steadily increased from the period when the government was founded until the present day ; and it has now come to be well understood that there is no alternative to take the place of a ready submission to the national will as expressed by or under the Constitution interpreted by the proper national organ, excepting a resort to methods that lie wholly without the Constitution, and that would completely subvert the principles on which it was founded. For while it is true that the people of each state constitute the sovereign power by which the rights and duties of its inhabitants not involved in the Constitution of the United States are to be exclusively governed, it is equally true that they do not constitute the whole of the sovereign power which governs those relations of its inhabitants that are committed to the national leg-

islature. The framers of the Constitution resorted to an enactment of that instrument by the people of the United States, and employed language which speaks in their name, for the express purpose, among other things, of bringing into action a national authority on certain subjects. The organs of the general government, therefore, are not the agents of the separate will of the people of each state, for certain specified purposes, as its state government is the agent of their separate will for all other purposes; but they are the agents of the will of a collective people, of which the inhabitants of a state are only a part. That the will of the whole should not be defeated by the will of a part was the purpose of the supremacy assigned to the Constitution of the United States; and that the rights and liberties of each part, not subject to the will of the whole, should not be invaded, was the purpose of the careful enumeration of the objects to which that supremacy was to extend.

In this supremacy of the national government within its proper sphere, and in the means which were devised for giving it practical efficiency, we are to look for the chief cause that has given to our system a capacity of great territorial extension. It is a system in which a few relations of the inhabitants of distinct states are confided to the care of a central authority; while, for the purpose of securing the uniform operation of certain principles of justice and equality throughout the land, particular restraints are imposed on the power of the states. With these exceptions, the several states remain free to pursue such systems of legislation as, in their own judgment, will best promote the interest and welfare of their inhabitants. Such a division of the political powers of society admits of the union of far greater numbers of people and communities than could be provided for by a single representative government, or by any other system than a vigorous despotism. Many of the wisest of the statesmen of that period, as we now know, entertained serious doubts whether the country embraced by the thirteen original states would not be too large for the successful operation of a republican government, having even so few objects committed to it as were proposed to be given to the Constitution of the United States. If those objects had been made to embrace all the relations of social life, it is extremely probable that the original limits of the Union would have far exceeded the capacities of a republican and representative government, even if

the first difficulties arising from the differences of manners, institutions, and local laws could have been overcome.

But these very differences may be, and in fact have been, made a means of vast territorial expansion by the aid of a principle which has been placed at the foundation of the American Union. Let a number of communities be united under a system which embraces the national relations of their inhabitants, and commits a limited number of the objects of legislation to the central organs of a national will, leaving their local and domestic concerns to separate and local authority, and the growth of such a nation may be limited only by its position on the surface of the earth. The ordinary obstacles arising from distance and the physical features of the country may be at once overcome, for a large part of the purposes of government, by this division of its authority. The wants and interests of civilized life, modified into almost endless varieties by climate, by geographical position, by national descent, by occupation, by hereditary customs, and by the accidental relations of different races, may in such a state of things be governed by legislation capable of exact adaptation to the facts with which it has to deal. In this way separate states under the republican form may be multiplied indefinitely.

Now what is required in order to make such a multiplication of distinct states at the same time a national growth is the operation of some principle that will preserve their national relations to the control of a central authority. This is effected by the supremacy of the Constitution of the United States, against which no separate state power can be exerted. This supremacy secures the republican form of government, the same general principles and maxims of justice, and the same limitations between state and national authority, throughout all the particular communities; while, at the same time, it regulates by the same system of legislation, applied throughout the whole, the rights and duties of individuals that are committed to the national authority. It was for the want of this supremacy and of the means of enforcing it that the Confederation, and all the other federal systems of free government known in history, had failed to create a powerful and effective nationality; and it is precisely this which has enabled the Constitution of the United States to do for the nation what all other systems of free government had failed to accomplish.

In this connection it seems proper to state the origin and purpose of that definition of treason which is found in the Constitution, and which was placed there in order, on the one hand, to defend the supremacy of the national government, and on the other to guard the liberty of the citizen against the mischiefs of constructive definitions of that crime. No instructions had been given to the committee of detail on this subject. They, however, deemed it necessary to make some provision that would ascertain what should constitute treason against the United States. They resorted to the great English statute of the 25th Edward III.; and from it they selected two of the offences there defined as treason, which were alone applicable to the nature of the sovereignty of the United States. The statute, among a variety of other offences, denominates as treason the levying of war against the king in his realm, and the adhering to the king's enemies in his realm, giving them aid and comfort in the realm, or elsewhere.<sup>1</sup> The levying of war against the government, and the adhering to the public enemy, giving him aid and comfort, were crimes to which the government of the United States would be as likely to be exposed as any other sovereignty; and these offences would tend directly to subvert the government itself. But to compass the death of the chief magistrate, to counterfeit the great seal or the coin, or to kill a judge when in the exercise of his office, however necessary to be regarded as treason in England, were crimes which would have no necessary tendency to subvert the government of the United States, and which could therefore be left out of the definition of treason, to be punished according to the separate nature and effects of each of them. The committee accordingly provided that "treason against the United States shall consist only in levying war against the United States, or any of them; and in adhering to the enemies of the United States, or any of them."<sup>2</sup>

But here, it will be perceived, two errors were committed. The first was, that the levying of war against a state was declared to be treason against the United States. This opened a very intricate question, and loaded the definition with embarrassment; for

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<sup>1</sup> 4 Blackstone's Com., Book IV. ch. 6.

<sup>2</sup> Art. VI. § 2 of the first draft of the Constitution. Elliot, V. 379.

however true it might be, in some cases, that an attack on the sovereignty of a state might tend to subvert or endanger the government of the United States, yet a concerted resistance to the laws of a state, which is one of the forms of "levying war" within the meaning of that phrase, might have in it no element of an offence against the United States, and might have no tendency to injure their sovereignty. Besides, if resistance to the government of a state were to be made treason against the United States, the offender, as was well said by Mr. Madison, might be subject to trial and punishment under both jurisdictions.<sup>1</sup> In order, therefore, to free the definition of treason of all complexity, and to leave the power of the states to defend their respective sovereignties without embarrassment, the Convention wisely determined to make the crime of treason against the United States to consist solely in acts directed against the United States themselves.

The other error of the committee consisted in omitting from the definition the qualifying words of the statute of Edward III., "giving them aid and comfort," which determine the meaning of "adhering" to the public enemy.<sup>2</sup> These words were added by the Convention, and the crime of treason against the United States was thus made to consist in levying war against the United States, or in adhering to *their* enemies by the giving of aid and comfort.<sup>3</sup>

With respect to the nature of the evidence of this crime, the committee provided that no person should be convicted of treason unless on the testimony of two witnesses. But to make this more definite, it was provided by an amendment that the testimony of the two witnesses should be to the same overt act; and also that a conviction might take place on a confession made in open court. The punishment of treason was not prescribed by the Constitution, but was left to be declared by the Congress; with the limitation, however, that no attainder of treason should work corruption of blood or forfeiture, except during the life of the person attainted.<sup>4</sup>

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<sup>1</sup> Elliot, V. 450.

<sup>2</sup> The effect of these words is as if the statute read "adhering to the enemy by giving him aid and comfort," and not as if they were two separate offences.

<sup>3</sup> See the debate, Elliot, V. 447-451.

<sup>4</sup> Ibid., Art. III. § 3 of the Constitution.

## CHAPTER XXIX.

### REPORT OF THE COMMITTEE OF DETAIL, CONTINUED.—ELECTION AND POWERS OF THE PRESIDENT.

IN describing the manner in which the Constitution and powers of the Senate were finally arranged, I have already had occasion to state that, after the report of the committee of detail came in—vesting the appointment of the president in the national legislature, creating a term of seven years, and making the incumbent ineligible a second time—a direct election by the people was negatived by a large majority. This mode of election, as a means of removing the appointment from the legislature, would have been successful, but it was inadmissible on other accounts. In the first place, it would have given to the government a character of complete consolidation, so far as the executive department was concerned, to have vested the election in the people of the United States as one community. In the second place, not only would the states, as sovereignties, have been excluded from representation in this department, but the slaveholding states would have had a relative weight in the election only in the proportion of their free inhabitants. On the other hand, to provide that the executive should be appointed by electors, to be chosen by the people of the states, involved the necessity of prescribing some rule of suffrage for the people of all the states, or of adopting the existing rules of the states themselves. Probably it was on account of this embarrassment that a proposition for electors to be chosen in this mode was negatived, by a bare majority, soon after the vote rejecting a direct election of the president by the people.<sup>1</sup> There remained the alternatives of an election by one or both of the houses of Congress, or by electors appointed by the states in a certain ratio, or by electors appointed by Congress. The difficulty of selecting from these various modes led the Convention to

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<sup>1</sup> August 24th. Elliot, V. 472, 473.



adhere to an election by the two houses; and when the disadvantages of this plan, already described, had developed the necessity for some other mode of appointment, the relations between the Senate and the executive were, as we have seen, sent to a grand committee, who devised a scheme for their adjustment.

In this plan it was proposed that each state should appoint, in such manner as its legislature might direct, a number of electors equal to the whole number of senators and representatives in Congress to which the state might be entitled under the provisions of the Constitution already agreed upon. The advantages of this plan were, that it referred the mode of appointing the electors to the states themselves, so that they could adopt a popular election, or an election by their legislatures, as they might prefer; and that it would give to each state the same weight in the choice of the president that it was to have in the two houses of Congress, provided a majority or a plurality of the electoral votes were to determine the appointment. The committee recommended that the electors should meet in their respective states, on the same day, and vote by ballot for two persons, one of whom, at least, should not be an inhabitant of the same state with themselves; and that the person having the greatest number of votes, if such number were a majority of all the electoral votes, should be the president. To this part of the plan there was likely to be little objection. But the mode of electing the president in case of a failure to concentrate a majority of the electoral votes upon one person, or in case more than one person should have such a majority, was the most difficult part of the whole scheme. The object of the committee was to devise a process which should result in the election both of a president and a vice-president; and they proposed to make the person having the next largest number of electoral votes the vice-president. If two of the persons voted for should have a majority of all the votes, and the same number of votes, then the Senate were immediately to choose one of them, by ballot, as the president; if no person should have such a majority, then the Senate were to choose the president by ballot from the five highest on the list of candidates returned by the electors. If a choice of the president had been effected by the electoral votes, the person having the next highest number of electoral votes was to be vice-president; and if there were two or more having an equal num-

ber of electoral votes, the Senate were to choose one of them as vice-president.

From the proceedings which took place upon this plan, it appears that what many of the framers of the Constitution most apprehended was that the votes in the electoral bodies would not be sufficiently concentrated to effect a choice, from want of the requisite general knowledge of the persons who might be considered in different parts of the Union as fit candidates for these high offices; and consequently that the election would be thrown into such other body as might be directed to make it after a failure in the action of the electors. It is a remarkable proof of their wisdom that, although intimations began to appear in the public prints, as soon as the Constitution was published, that Washington would be the first President of the United States—an expectation that must, therefore, have been entertained by the members of the Convention before they had finished their labors—they were at no time under the influence of this pleasing anticipation.<sup>1</sup> They kept steadily in view a state of things in which, from the absence of statesmen of national reputation and influence, and from the effect of local preferences, no choice would be made by the electors. Hence their solicitude to provide for the secondary election in such a way as to admit of a re-election of the incumbent. It was soon found that between the president and the Senate there would be a mutual connection and influence, which would be productive of serious evils, whether he were to be made eligible or ineligible a second time, if the Senate were to have the appointment after the electors had failed to make a choice. To remedy this, many of the members, among whom was Hamilton, preferred to let the highest number of electoral votes, whether a majority or not, appoint the president. As the grand committee had proposed to reduce the term of office from seven to four years, and to strike out the clause making the incumbent ineligible—a change which met the approbation of a large majority of the states—it became still more necessary to prevent any resort to the Senate for a secondary election. But an appoint-

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<sup>1</sup> The Constitution was published in the Pennsylvania Journal, Sept. 19th. On the 27th another Philadelphia paper suggested, or, as we should now say, "nominated," General Washington for the presidency.

ment by less than a majority of the electoral votes presented, on the other hand, the serious objection that the president might owe his appointment to a minority of the states. To preserve, as far as possible, a federal character for the government, in some of its departments, was justly regarded as a point of great importance. One branch of the legislature had become a depository of the democratic power of a majority of the people of the United States;—the other branch was the representative of the states in their corporate capacities;—the president was to be in some sense a third branch of the legislative power, by means of his limited control over the enactment of laws;—and it was, therefore, something more than a mere question of convenience whether he should, at the final stage of the process, be elected by a less number than a majority of all the states. That part of the plan which proposed to elect him by a majority of all the electoral votes, giving to each state as many votes as it was to have in both houses of Congress, might make the individual, when so elected, theoretically the choice of a majority of the people of the United States, although not necessarily the choice of a majority of the states. But there was a peculiar feature of this plan—afterwards, in the year 1804, changed to a more direct method—by which the electors were required to return their votes for two persons, without designating which of them was their choice for president and which for vice-president, the designation being determined by the numbers of votes found to be given for each person. This method of voting increased the chances of a failure to choose the president by the electoral votes. It is not easy to understand why the framers of the Constitution adhered to it; although it is probable that its original design was to prevent corruption and intrigue. Whatever its purpose may have been, it served to make still more prominent the expediency, not only of removing the ultimate election from the Senate, but of providing some mode of conducting that election by which an appointment by a minority of the states would be prevented, when a majority of the electoral votes had not united upon any one individual, or had united upon two.

The plan which had been prepared by the grand committee, and which adjusted the relations between the executive and the Senate respecting appointments and treaties, had left no body in

the government so likely to be free from intimate relations with the president, and at the same time so capable of being made the instrument of an election, as the House of Representatives. By the fundamental principle on which that body had been agreed to be organized—in direct contrast to the basis of the Senate—its members were the representatives of the people inhabiting the several states, and in the business of legislation a majority of their votes could express the will of a majority of the people of the United States. But the representatives were to be chosen in the separate states; and nothing was more easy, therefore, than to provide that, in any other function, they should act as the agents of their states, making the states themselves the real parties to the act, without doing any violence to the principle on which they were assembled for the purposes of legislation. Accordingly, as soon as a transfer of the ultimate election from the Senate to the House of Representatives was proposed, the method of voting by states was adopted, with only a single dissent.<sup>1</sup> The establishment of two thirds as a quorum of the states for this purpose, and the provision that a majority of all the states should be necessary to a choice, followed naturally as the proper safeguards against corruption, and were adopted unanimously.

The principal office of the executive department was thus provided for; but the ultimate choice of the vice-president remained to be regulated. This office was unknown to the draft of the Constitution prepared by the committee of detail, and was suggested only when the mode of organizing the executive, and of providing for some of the separate functions of the Senate, came to be closely considered together. We are to look for its purposes, therefore, in the provisions specially devised for the settlement of these relations. In the first place, it was apparent that the executive would be a branch of the government that ought never to be vacant. The principle which, in hereditary monarchies, on the death of the sovereign, instantly devolves the executive power upon him who stands next in a fixed order of succession, must in some degree be imitated in purely elective governments, if great mischiefs are to be avoided. The difficulty which attends its application to such governments consists not in the nature of

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<sup>1</sup> Delaware. Elliot, V. 519.

the principle itself, but in finding a number of public functionaries who can be placed in a certain order of succession, without creating mere heirs to the succession, for that purpose alone. In hereditary governments the members of a family, in a designated order, stand as the successive recipients of the executive office; and each of them, until he reaches the throne, may have no other function in the state than that of an heir, near or remote, to the crown, and may, without inconvenience to the public welfare, occupy that position alone. But in elective, and especially in republican governments, the succession must be devolved on some person already filling some other office; for to designate as a successor to the chief magistrate a person who has no public employment, and no other public position than that of an heir-apparent, would be attended with many obvious disadvantages in such a government.

Fortunately the peculiar construction of the Senate was found to require a presiding officer who should not be a member of the body itself. As each state was to be represented by two delegates, and as it would be important not to withdraw either of them from active participation in the business of the chamber, a presiding officer was needed who would represent neither of the states. By placing the vice-president of the United States in this position he would have a place of dignity and importance, would be at all times conversant with the public interests, and might pass to the chief magistracy, on the occurrence of a vacancy, attended with the public confidence and respect. This arrangement was devised by the grand committee, and was adopted with general consent. It contemplated, also, that the vice-president, as president of the Senate, should have no vote, unless upon questions on which the Senate should be equally divided; and on account of his relation to this branch of the legislature, the ultimate election of the vice-president, when the electors had failed to appoint him under the rule prescribed, was retained in the hands of the Senate.

The rule that was to determine when the vice-president was to succeed to the functions of the chief magistrate was also embraced in the plan of the grand committee. It was apparent that a vacancy in the principal office might occur by death, by resignation, by the effect of inability to discharge its powers and duties, and by the consequences of an impeachment. When either of these

events should occur it was provided that the office should devolve on the vice-president. In the case of death or resignation of the president no uncertainty can arise. In a case of impeachment a judgment of conviction operates as a removal from office. But the grand committee did not provide, and the Constitution does not contain any provision or direction, for ascertaining the case of an inability to discharge the powers and duties of the office. When such an inability is supposed to have occurred, and is not made known by the president himself, how is it to be ascertained? Is there any department of the government that can, with or without a provision of law, proceed to inquire into the capacity of the president, and to pronounce him unable to discharge his powers and duties? What is meant by the Constitution as *inability* is a case which does not fall within the power of impeachment, for that is confined to treason, bribery, and other high crimes and misdemeanors. It is the case of a simple incapacity, arising from insanity, or ill-health, or, as might possibly occur, from restraint of the person of the president by a public enemy. But in the former case how shadowy are the lines which often separate the sound mind or body from the unsound! Society has had one memorable example, in modern times and in a constitutional monarchy, of the delicacy and difficulty of such an inquiry; an instance in which all the appliances of science and all the fixed rules of succession were found scarcely sufficient to prevent the rage of party and the struggles of personal ambition from putting the state in jeopardy.<sup>1</sup> With us, should such a calamity ever happen, there must be a similar effort to meet it as nearly as possible upon the principles of the Constitution, and consequently there must be a similar strain on the Constitution itself.

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<sup>1</sup> I allude, of course, to the case of King George III., which had not happened when our Constitution was framed. To ascertain the sanity of a private person is certainly often no less delicate and difficult than to inquire into the sanity of a person in a high public position. But there is a legal process for determining the capacity of every person to discharge private duties or to exercise private rights. In the case of the President of the United States there is no mode provided by the Constitution for ascertaining his inability to discharge his public functions, and no authority seems to have been given to Congress to provide for such an inquiry. Perhaps the authority could not have been given with safety and propriety.

In order to make still further provision for the succession, Congress were authorized to declare by law what officer should act as president in case of the removal, death, resignation, or inability of both the president and the vice-president, until the disability should be removed, or a new president should be elected.

The mode of choosing the electors was, as we have seen, left to the legislatures of the states. Uniformity, in this respect, was not essential to the success of this plan for the appointment of the executive, and it was important to leave to the people of the states all the freedom of action that would be consistent with the free working of the Constitution. But it was necessary that the time of choosing the electors, and the day on which they were to give their votes, should be prescribed for all the states alike. These particulars were, therefore, placed under the direction of Congress, with the single restriction that the day of voting in the electoral colleges should be the same throughout the United States. In order to make the electors a distinct and independent body of persons, appointed for the sole function of choosing the president and vice-president, it was provided further that no senator or representative, or person holding an office of trust or profit under the United States, shall be appointed an elector.<sup>1</sup>

The electors were required to meet in their respective states, and to vote by ballot for two persons, one of whom at least should not be an inhabitant of the same state with themselves. Having made a list of all the persons voted for, and of the number of votes given for each, they were to sign and certify it, and to transmit it sealed to the seat of government of the United States, directed to the president of the Senate, who, in the presence of the Senate and the House of Representatives, was to open all the certificates, and the votes were then to be counted.

Such was the method devised by the framers of the Constitution for filling the executive office. Experience has required some changes to be made in it. It has been found that to require the electors to designate the persons for whom they vote as the president and vice-president, respectively, has a tendency to secure a

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<sup>1</sup> This clause was inserted, by unanimous consent, on the motion of Mr. King and Mr. Gerry, September 6th. Elliot, V. 515.

choice by the electoral votes, and therefore to prevent the election from being thrown into the House of Representatives; and it has also been deemed expedient, when the election has devolved on the House of Representatives, to confine the choice of the states to the three highest candidates on the list returned by the electors. These changes were made by the twelfth of the amendments to the Constitution, adopted in the year 1804, which also provides that the person having the greatest number of electoral votes for president shall be deemed to be chosen by the electors, if such number be a majority of the whole number of electors appointed. If a choice is not made by the electors, or by the House of Representatives, before the fourth day of March next following the election, the amendment declares that the vice-president shall act as president, "as in the case" (provided by the Constitution) "of the death or other constitutional disability of the president."

In the appointment of the vice-president the amendment has also introduced some changes. The person having the greatest number of the electoral votes as vice-president, if the number is a majority of all the electors appointed, is to be the vice-president; but if no choice is thus effected, the Senate are to choose the vice-president from the two highest candidates on the list returned by the electors; but a quorum for this purpose is to consist of two thirds of the whole number of senators, and a majority of the whole number is made necessary to a choice. The amendment further adopts the same qualifications for the office of vice-president as had been established by the Constitution for the office of president.<sup>1</sup>

Thus it appears, from an examination of the original Constitution and the amendment, that the most ample provision is made for filling the executive office, in all contingencies but one. If the electors fail to choose according to the rule prescribed for them, the election devolves on the House of Representatives. If that body does not choose a president before the fourth day of March next ensuing, the office devolves on the vice-president elect, whether he has been chosen by the electors or by the Senate. But if the House of Representatives fail to choose a president, and the Sen-

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<sup>1</sup> See post, p. 739.



ate make no choice of a vice-president, or the vice-president elect dies before the next fourth day of March, the Constitution makes no express provision for filling the office, nor is it easy to discover in it how such a vacancy is to be met. The Constitution, it is true, confers upon Congress authority to provide by law for the case of removal, death, resignation, or inability of *both* the president and vice-president, and to declare what officer shall then act as president; and it provides that the officer so designated by a law of Congress shall act accordingly, until the disability be removed or a president shall be elected. But there is every reason to believe that this provision embraces the case of a vacancy in both offices occasioned by removal, death, resignation, or inability, not of the president and vice-president elect, but of the president and vice-president in office. It may be doubted whether the framers of the original Constitution intended to provide for a vacancy in both offices occasioned by the failure of the House of Representatives to elect a president and the death of the vice-president elect, or a non-election of a vice-president by the Senate, before the fourth day of March. Their plan was, in the first instance, studiously framed for the purpose of impressing on the electors the duty of concentrating their votes; and although they saw and provided for the evident necessity of an election of a president by the House of Representatives, when the electoral votes had not produced a choice, they omitted all express provision for a failure of the House to choose a president, apparently for the purpose of making the states in that body feel the importance of the secondary election, and the duty of uniting their votes. This omission was supplied by the amendment, which authorizes the vice-president elect to act as president when the House of Representatives have failed to choose a president, "as in the case of the death or other constitutional disability of the president." This adoption, for the case of a non-election by the House, of the mode of succession previously established by the Constitution, shows that the authority which the Constitution gave to Congress to declare by law what officer shall act as president, in case of a vacancy in both offices, was confined to the removal, death, resignation, or inability of the president and vice-president in office, and does not refer to the president and vice-president elect, whose term of office has not commenced.

The committee of detail made no provision respecting the qualifications of the president. But the grand committee, to whom the construction of the office was referred, recommended the qualifications which are to be found in the Constitution; namely, that no person shall be eligible to the office who was not born a citizen of the United States, or was not a citizen at the time of the adoption of the Constitution, and who had not attained the age of thirty-five years, and been fourteen years a resident within the United States. These requirements were adopted with unanimous assent.<sup>1</sup>

That the executive should receive a stipend, or pecuniary compensation, was a point which had been settled in the earliest stage of the proceedings, notwithstanding the grave authority of Franklin, who was opposed to it. The speech which he delivered on this subject was based upon the maxim that in all cases of public service, the less profit, the greater honor. He seems to have been actuated chiefly by the fear that the government would in time be resolved into a monarchy; and he thought this catastrophe would be longer delayed if the seeds of contention, faction, and tumult were not sown in the system by making the places of honor places of profit. He maintained this opinion for the case even of a plural executive, which he decidedly advocated; and he instanced the example of Washington, who had led the armies of the Revolution for eight years without receiving the smallest compensation for his services, to prove the practicability of "finding three or four men, in all the United States, with public spirit enough to bear sitting in peaceful council for perhaps an equal term, merely to preside over our civil concerns, and see that our laws are duly executed." His plan was treated with the respect due to his illustrious character, but no one failed to see that it was a "Utopian idea."<sup>2</sup> The example of Washington was, in truth, inapplicable to the question. A patriotic Virginia gentleman, of ample fortune, was called upon, in the day of his country's greatest trial, to take the lead in a desperate struggle for independence.

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<sup>1</sup> Elliot, V. 462, 507, 521, 522.

<sup>2</sup> He anticipated that it would be so regarded. Hamilton, who was in all his views as unlike Franklin as any man could be, seconded the motion, out of respect for the mover.

The nature of the war, his own eminence, his character and feelings, the poverty of a country which he foresaw would often be unable to pay even the common soldier, and his motives for embarking in the contest, all united to make the idea of compensation inadmissible to a man whose fortune made it unnecessary. Such a combination of circumstances could scarcely ever occur in the case of a chief magistrate of a regular and established government. If an individual should happen to be placed in the office who possessed private means enough to render a salary unnecessary to his own wants, or to the dignity of the position, the duty of his example might point in precisely the opposite direction, and make it expedient that he should receive what his successors would be unable to decline. But the real question which the framers of the Constitution had to decide was, in what way could the office be constituted so as to give the people of the United States the widest range of choice among the public men fit to be placed in it. To attach no salary to the chief executive office, in a republican government, would practically confine the office to men who had inherited or accumulated wealth. The Convention determined that this mischief should be excluded. They adopted the principle of compensation for the office of chief magistrate, and when the committee of detail came to give effect to this decision, they added the provision that the compensation shall neither be increased nor diminished during the period for which a president has been elected.<sup>1</sup> The limitation which confines the president to his stated compensation, and forbids him to receive any other emolument from the United States, or from any state, was subsequently introduced, but not by unanimous consent.<sup>2</sup>

The question whether the single person in whom the executive power was to be vested should exercise it with or without the aid or control of any council of state was one that in various ways ran through the several stages of the proceedings. As soon as it was settled that the executive should consist of a single person, the nature and degree of his responsibility, and the extent to which it might be shared by or imposed upon any other officers, became matters of great practical moment. What was called at one time a council of revision was a body distinct from a cabinet

<sup>1</sup> Elliot, V. 380.

<sup>2</sup> Connecticut, New Jersey, Delaware, and North Carolina voted against it.

council, and was proposed for a different purpose. The function intended for it by its advocates related exclusively to the exercise of the revisionary check upon legislation. But we have seen that the nature of this check, the purposes for which it was to be established, and the practical success with which it could be introduced into the legislative system, required that the power and the responsibility should rest with the president alone. There remained, however, the further question concerning a cabinet, or council of state; an advisory body, with which some of the most important persons in the Convention desired to surround the president, to assist him in the discharge of his duties, without the power of controlling his actions, and without diminishing his legal responsibility. Such a plan not having received the sanction of the Convention, the draft of the Constitution reported by the committee of detail of course contained no provision for it. It was subsequently brought forward, and received the recommendation of a committee;<sup>1</sup> but the grand committee, who were charged with the adjustment of the executive office, substituted for it a different provision, which gave the president power to "require the opinion in writing of the principal officer in each of the executive departments, upon any subject relating to the duties of their respective offices." The friends of a council<sup>2</sup> regarded this arrangement of the executive office, especially with regard to the power of appointment, as entirely defective.<sup>3</sup> But the reason on which it was rested by the grand committee, and on which the plan of a council of state was rejected, was, that the President of the United States, unlike the executive in mixed governments of the monarchical form, was to be personally responsible for his official conduct, and that the Constitution should do nothing to diminish that responsibility, even in appearance. If it had not been intended to make the president liable to impeachment a cabinet might have been useful, and would certainly have been necessary, if there was to be any responsibility anywhere for executive acts. But a large majority of the states preferred to interpose no shield between the president and a public accusation. He might derive any assistance from the great officers of

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<sup>1</sup> Elliot, V. 446, 462.

<sup>2</sup> Mason, Franklin, Wilson, Dickinson, and Madison.

<sup>3</sup> Elliot, V. 525.

the executive departments which Congress might see fit to establish that he could obtain from their opinions or advice; but the powers which the Constitution was to confer on him must be exercised by himself, and every official act must be performed as his own.<sup>1</sup>

What those powers were to be had not been fully settled when the first draft of the Constitution came from the committee of detail. The executive function, or the power and duty of causing the laws to be duly and faithfully executed; authority to give information to Congress on the state of the Union, and to recommend measures for their consideration; power in certain cases to convene and to adjourn the two houses; the commissioning of all officers, and the appointing to office in cases not otherwise provided for by the Constitution; the receiving of ambassadors; the granting of reprieves and pardons; the chief command of the army and navy of the United States and of the militia of the several states—were all provided for. But the foreign rela-

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<sup>1</sup> Those who are not familiar with the precise structure of the American government will probably be surprised to learn that what is in practice sometimes called the "Cabinet" has no constitutional existence as a directory body, or one that can decide anything. The theory of our government is, that what belongs to the executive power is to be exercised by the uncontrolled will of the president. Acting upon the clause of the Constitution which empowers the president to call for the opinions in writing of the heads of departments, Washington, the first president, commenced the practice of taking their opinions in separate consultation; and he also, upon important occasions, assembled them for oral discussion, in the form of a council. After having heard the reasons and opinions of each, he decided the course to be pursued. The second president, Mr. John Adams, followed substantially the same practice. The third president, Mr. Jefferson, adopted a somewhat different practice. When a question occurred of sufficient magnitude to require the opinions of all the heads of departments, he called them together, had the subject discussed, and a vote taken, in which he counted himself but as one. But he always seems to have considered that he had the *power* to decide against the opinion of his cabinet. That he never, or rarely, exercised it, was owing partly to the unanimity in sentiment that prevailed in his cabinet, and to his desire to preserve that unanimity, and partly to his disinclination to the exercise of personal power. When there were differences of opinion, he aimed to produce a unanimous result by discussion, and almost always succeeded. But he admits that this practice made the executive, in fact, a directory. Jefferson's Works, V. 94, 568, 569.

tions of the country were committed wholly to the Senate, as was also the appointment of ambassadors and of judges of the Supreme Court. It is not necessary to explain again the grounds on which the Convention were finally obliged to alter this arrangement. It will be convenient, however, to take up the several powers and functions of the executive, and to describe briefly the scope and purpose ultimately given to each of them.

In the plan of government originally proposed by Governor Randolph the division into the three departments of an executive, a legislative, and a judiciary implied, for the first of these departments, according to the theory of all governments which are thus separated, power to carry into execution the existing laws. This government, however, was to succeed one that had regulated the affairs of the Union for several years, in which all the powers vested in the confederacy of the states were held and exercised by the Congress of their deputies; and among those powers was that of declaring war and making peace. This function is, moreover, embraced in the general powers of the executive department, in most governments in which there is a regular separation of that department from the legislative and the judicial. But it became apparent at the very commencement of the process of forming the Constitution of the United States that the question whether the executive should be intrusted with the power of war and peace would not only be made, but that the system would have to be so arranged as to make the government, in this particular, an exception to the general rule. This was partly owing to an unwillingness to intrust such a power to one person—or even to a plurality of persons, if the executive should be so constituted. If to the general powers of executing the laws and of appointing to office there were to be added the power to make war and peace, and the whole were to be vested in a single magistrate, it was rightly said that the government would be in substance an elective monarchy. The power of the executive, over the external relations of the country at least, would be the same, in kind and in extent, as it is in constitutional monarchies, and the sole difference would be that the supreme magistrate would be elective. This was not intended, and was not admissible. Still another reason for making the government of the United States, in this feature, an exception to the general

rule, was the necessity for giving to the states, in their corporate capacities, some control over the foreign relations of the country.

Our further inquiries concerning this part of the powers and functions of the chief magistrate will only need to extend so far as to ascertain what is the "executive power" which the Constitution declares shall be "vested" in the president. In the resolutions, which at different stages had previously passed in the Convention, this had been described as a "power to carry into execution the national laws;" and this description was regarded as including such other powers, not legislative or judicial in their nature, as might from time to time be delegated to the president by Congress.<sup>1</sup> The committee of detail, in drafting the Constitution, employed the phrase "executive power" to describe what had thus been designated by the resolutions sent to them; and as the plan of government which they presented proposed to make the declaration of a state of war a legislative act, the prosecution of a war, when declared, was left to fall within the executive duties as part of the "executive power." In order, moreover, that the executive duties might be still more clearly defined, the committee provided that the president "shall take care that the laws be faithfully executed," and imposed upon him the same obligation by the force of his oath of office. The committee having been directed to provide for the end in view, it was considered that they were also to provide the means by which the end was to be obtained.<sup>1</sup> Accordingly they made the president commander-in-chief of the army and navy, and of the militia of the states when called into the service of the United States. The president appears, therefore, to have been placed in the same position with reference to the means to be employed in the discharge of all his executive duties, when force may in his judgment be necessary. The declaration of a state of war is an enactment by the legislative branch of the government; the creation of laws is a function that belongs exclusively to the same department;—but when a law exists, or the state of war exists, it is for the president, by virtue of his executive office, and of his position as commander-in-chief, to employ the army and navy, and the militia actually called into the service of the United States, in the execution of the law, or

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<sup>1</sup> Elliot, V. 141, 142.

<sup>2</sup> Ibid., 843, 844.

the prosecution of hostilities, in such a manner as he may think proper.<sup>1</sup>

Closely allied to the power of executing the laws is that of pardoning offences, and relieving against judicial sentences. This power was originally extended by the committee of detail to all offences against the United States, excepting cases of impeachment, in which they provided that the pardon of the president should not be pleaded in bar. This would have made the power precisely like that of the king of England; since, by the English law, although the king's pardon cannot be pleaded in bar of an impeachment, he may, after conviction, pardon the offender. But as it was intended in the Constitution of the United States to limit the judgment in an impeachment to a removal from office, and to subsequent disqualification for office, there would not be the same reason for extending to it the executive power of pardon that there is in England, where the judgment is not so limited. The Convention, therefore, took from the president all power of pardon in cases of impeachment, making them the sole exception to the power.<sup>2</sup> A strong effort was indeed made to establish another exception in cases of treason, upon the ground, chiefly, that the criminal might be the president's own instrument in an attempt to subvert the Constitution. But since all agreed that a power of pardon was as necessary in cases of treason as in all other offences, and as it must be given to the legislature, or to one branch of it, if not lodged with the executive, a very large majority of the states preferred to place it in the hands of the president, especially as he would be subject to impeachment for any participation in the guilt of the party accused.<sup>3</sup>

The power to make treaties, which had been given to the

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<sup>1</sup> The Constitution having vested in Congress power to provide for calling the militia into the service of the United States, to execute the laws, suppress insurrections, and repel invasions, the president cannot call out the militia unless authorized to do so by Congress. But with respect to the employment of the army and navy for any executive purpose, it may be doubted whether any authority from Congress is necessary; as it may also be doubted whether Congress can exercise any control over the president in the use of the land or naval forces, either in the execution of the laws, or in the discharge of any other executive duty.

<sup>2</sup> Elliot, V. 480.

<sup>3</sup> Ibid., 549.



Senate by the committee of detail, and which was afterwards transferred to the president, to be exercised with the advice and consent of two thirds of the senators present, was thus modified on account of the changes which the plan of government had undergone, and which have been previously explained. The power to declare war having been vested in the whole legislature, it was necessary to provide the mode in which a war was to be terminated. As the president was to be the organ of communication with other governments,<sup>1</sup> and as he would be the general guardian of the national interests, the negotiation of a treaty of peace, and of all other treaties, was necessarily confided to him. But as treaties would not only involve the general interests of the nation, but might touch the particular interests of individual states, and, whatever their effect, were to be part of the supreme law of the land, it was necessary to give to the senators, as the direct representatives of the states, a concurrent authority with the president over the relations to be affected by them. The rule of ratification suggested by the committee to whom this subject was last confided was, that a treaty might be sanctioned by two thirds of the senators present, but not by a smaller number. A question was made, however, and much considered, whether treaties of peace ought not to be subjected to a different rule. One suggestion was, that the Senate ought to have power to make treaties of peace without the concurrence of the president, on account of his possible interest in the continuance of a war from which he might derive power and importance.<sup>2</sup> But an objection, strenuously urged, was that, if the power to make a treaty of peace were confided to the Senate alone, and a majority or two thirds of the whole Senate were to be required to make such a treaty, the difficulty of obtaining peace would be so great that the legislature would be unwilling to make war on account of the fisheries, the navigation of the Mississippi, and other important objects of the Union.<sup>3</sup> On the other hand, it was said that a majority of the states might be a minority of the people of the United States, and that the representatives of a minority of the

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<sup>1</sup> It was to be one of the distinct functions of the president "to receive ambassadors and other public ministers."

<sup>2</sup> Mr. Madison so thought. Elliot, V. 524.

<sup>3</sup> Ibid.

nation ought not to have power to decide the conditions of peace.

The result of these various objections was a determination on the part of a large majority of the states not to make treaties of peace an exception to the rule, but to provide a uniform rule for the ratification of all treaties. The rule of the Confederation, which had required the assent of nine states in Congress to every treaty or alliance, had been found to work great inconvenience; as any rule must do which should give to a minority of states power to control the foreign relations of the country. The rule established by the Constitution, while it gives to every state an opportunity to be present and to vote, requires no positive quorum of the Senate for the ratification of a treaty; it simply demands that the treaty shall receive the assent of two thirds of all the members who may be present. The theory of the Constitution undoubtedly is, that the president represents the people of the United States generally, and the senators represent their respective states; so that, by the concurrence which the rule thus requires, the necessity for a fixed quorum of the states is avoided, and the operations of this function of the government are greatly facilitated and simplified.<sup>1</sup> The adoption, also, of that part of the rule which provides that the Senate may either "advise or consent," enables that body so far to initiate a treaty as to propose one for the consideration of the president—although such is not the general practice.

Having already described the changes which took from the Senate alone the appointment of the judges of the Supreme Court and ambassadors, it is only necessary in this connection to notice the manner in which the power of appointment to all offices received its final scope and limitations. The plan reported by the committee of detail had, as we have repeatedly seen, vested the appointment of ambassadors and judges of the Supreme Court in the Senate, and had given to the president the sole voice in the appointment of all other officers of the United States. The adjustment afterwards made gave the nomination of all officers to

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<sup>1</sup> The several votes taken upon different aspects of the rule for the ratification of treaties make the theory quite clearly what is stated in the text. See the proceedings, September 7th, 8th. Elliot, V. 524, 526.

the president, but required the advice and consent of the Senate to complete an appointment. Two inconveniences were likely to be experienced under this arrangement. Many inferior offices might be created, which it would be unnecessary and inexpedient to fill by this process of nomination by the president and confirmation by the Senate; and vacancies might occur in all offices, which would require to be filled while the Senate was not in session. To obviate these inconveniences the Congress were authorized to vest the appointment of such inferior officers as they might think proper in the president alone, in the courts of law, or in the heads of departments; and power was given to the president to fill up all vacancies that might happen during the recess of the Senate, by granting commissions which should expire at the end of their next session.<sup>1</sup> In order to restrain the president from practically creating offices by the power of appointment, his power was limited to "offices created by law," and to those specially enumerated in the Constitution.<sup>2</sup>

In addition to these powers the committee of detail had provided for certain direct relations, of a special nature, between the president and the Congress. One of these was to consist in giving to the Congress from time to time information of the state of the Union, and in recommending to their consideration such measures as he shall judge necessary and expedient. The other was embraced in the power to convene the two houses on extraordinary

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<sup>1</sup> This power embraces of course only those offices the appointment to which is vested in the president and Senate.

<sup>2</sup> The Constitution (Art. II. § 2) seems to contemplate ambassadors, other public ministers and consuls, and judges of the Supreme Court, as officers to exist under the Constitution, whether provision is or is not made by law for their appointment and functions. It is made the imperative duty of the president to nominate, and with the consent of the Senate to appoint them. Hence it has been supposed that the president can appoint a foreign minister without waiting to have his particular office regulated or established by law; and as the president conducts the foreign intercourse of the country, he could prescribe the duties of such a minister. In like manner, with the consent of the Senate, the president could appoint a judge of the Supreme Court, and would be bound to do so, although no act of Congress existed providing for the organization and duties of the court. But as the president cannot distribute the judicial power, the court, when so appointed, would have only the functions conferred by the Constitution, namely, original jurisdiction in certain enumerated cases.

occasions; and, whenever there should be a disagreement between them with respect to the time of adjournment, to adjourn them to such time as he shall think proper. The latter power is to be taken in connection with the clause which requires Congress to meet at least once in every year, and on the first Monday in December, unless a different day shall be appointed by law. Neither the two houses by agreement, nor the president in case of a disagreement, can fix on a time of adjournment beyond the day of the commencement of the next regular session. But subject to this restriction, the power of the president to determine the time at which the two houses shall reassemble, when they do not agree upon a time, extends to every session of Congress, whether it be regular or "extraordinary."<sup>1</sup>

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<sup>1</sup> In the text of the Constitution the president's power to adjourn the two houses of Congress in case of a disagreement follows immediately after his power to convene them on "extraordinary occasions;" and it has, therefore, been suggested that his power to adjourn them is confined to cases where they have been "extraordinarily" convened under the first power. But it is to be observed that the whole of the third section of Article II. contains an enumeration of separate powers of the president, recited *seriatim*. The power to *convene* Congress is one power; and it extends only to "extraordinary" occasions, because the Constitution itself, or a law, convenes them at a fixed period, and thus makes the *ordinary* occasions. But the power to adjourn the two houses to a particular time, in cases of disagreement as to the time, is a separate and general power, because the reason for which it was given at all applies equally to all sessions. That reason is, that there may be a peaceful termination of what would otherwise be an endless and dangerous controversy. Both Hamilton in the *Federalist* and Judge Story in his *Commentaries* have treated this as a separate and general power. The *Federalist*, No. 77. Story on the Constitution, § 1563.

## CHAPTER XXX.

### REPORT OF THE COMMITTEE OF DETAIL, CONTINUED.—FORMATION OF THE JUDICIAL POWER.

THERE now remains to be described the full conception and creation of the third department of the government, its judicial power.

The distribution of the powers of government, when its subjects are to sustain no relation to any other sovereignty than that whose fundamental laws it is proposed to ordain, is a comparatively easy task. In such a government, when the theoretical division into the legislative, executive, and judicial functions is once adopted, the objects to which each is to be directed fall readily into their appropriate places. All that is necessary is, to see that these departments do not encroach upon the rights and duties of each other. There is, at least, no other power, claiming the obedience of the same people, whose just authority it is necessary to regard, and on whose proper domain no intrusion is to be permitted.

How different is the task when a government, either federal or national, is to be created, for a people inhabiting distinct political states, whose sovereign power is to remain for many purposes supreme over their respective subjects; when the individual is to be under rules of civil duty declared by different public organs; and when the object is to provide a judicial system through which this very difference of authority may be made to work out the ends of social order, harmony, and peace! This difficult undertaking was imposed upon the framers of the Constitution of the United States, and it was by far the most delicate and difficult of all their duties. It was comparatively easy to agree on the powers which the people of the states ought to confer on the general government, to define the separate functions of the legislature and the executive, and to lay down certain rules of public policy which

should restrain the states in the exercise of their separate powers over their own citizens. But to construct a judicial power within the general government, and to clothe it with attributes which would enable it to secure the supremacy of the general Constitution and of all its provisions; to give it the exact authority that would maintain the dividing line between the powers of the nation and those of the states, and to give to it no more; and to add to these a faculty of dispensing justice to foreigners, to citizens of different states, and among the sovereign states themselves, with a more even hand and with a more assured certainty of the great ends of justice than any state power could furnish—these were objects not readily or easily to be attained. Yet they were attained with wonderful success. The judicial power of the United States, considered with reference to its adaptation to the purposes of its creation, is one of the most admirable and felicitous structures that human governments have exhibited.

The groundwork of its formation has been partly described in a previous chapter, where some of the principles are stated which had been arrived at as being necessary to its great purposes. These principles related to the persons who were to exercise its functions, and to the jurisdiction or authority which they were to possess. With respect to the persons who were to exercise the judicial power, the result that had been reached when the first draft of the Constitution was to be prepared had fixed the tenure of good behavior for their office, and had placed their salaries, when once established, beyond the reach of any power of diminution by the legislature. It had also been determined that there should be one supreme tribunal, under the Constitution, and that the legislature should have power to establish inferior tribunals. But nothing more precise had been arrived at respecting jurisdiction than the broad principles which declared that it should extend to cases arising under laws passed by the general legislature, and to such other questions as might touch the national peace and harmony. The committee of detail were to give effect to this declaration. Their scheme provided, under the first of these heads, that the jurisdiction should embrace cases arising under the laws of the United States; and as questions touching the national peace and harmony, they enumerated all cases affecting ambassadors, other public ministers, and consuls; impeachments of officers of

the United States; all cases of admiralty and maritime jurisdiction; controversies between two or more states, excepting such as might regard territory or jurisdiction; controversies between a state and citizens of another state, between citizens of different states, and between a state or the citizens thereof and foreign states, citizens, or subjects. In cases of impeachment, cases affecting ambassadors, other public ministers, and consuls, and those in which a state should be party, they assigned the original jurisdiction to the Supreme Court. In all the other cases enumerated the jurisdiction of the supreme tribunal was to be appellate only, with such exceptions and regulations as the legislature might make; and the original jurisdiction was left to be assigned by the legislature to such inferior tribunals as they might from time to time create. The trial of all criminal offences, except in cases of impeachment, was to be in the state where they had been committed, and was to be by jury. Controversies between states respecting jurisdiction or territory, and controversies concerning lands claimed under grants of different states, were to be tried by the Senate, and were consequently excluded from the judicial power.

This plan, when compared with the full outline of the jurisdiction, as it was finally established, presented several remarkable defects. In the first place, it was silent with respect to the important distinction, familiar to the people of the United States, between proceedings in equity and proceedings at common law. This distinction, which extends not only to the forms of pleading, but to the principles of decision, the mode of trial, and the nature of the remedy, had been brought by the settlers of most of the colonies from England, and had been perpetuated in their judicial institutions. It existed in most of the states at the time of the formation of the national Constitution, and it was, in fact, a characteristic feature of the only system of judicature which the American people had known, excepting in their courts of admiralty. Although the institutions of the states differed in the degree in which they had adopted and followed it, the basis of their jurisprudence and forms of proceeding was the common law, as derived from its English sources and modified by their own customs or legislation, with more or less of that peculiar and more ample relief which is afforded by the jurisprudence and remedy known in the English system under the name of equity.

Since the judicial power of the United States was to be exercised over a people whose judicial habits were thus fixed ; since it must, to some extent, take cognizance of rights that would have to be adjudicated in accordance with the jurisprudence under which they had arisen ; and since the individuals who would have a title to enter its tribunals might reasonably demand remedies as ample as a judicature of English origin could furnish, it was highly expedient that the Constitution should fully adopt the main features of that judicature. It is quite true that a provision in the Constitution extending the judicial power to "all cases" affecting certain persons or certain rights might be regarded by the legislature as a sufficient authority for the establishment of inferior courts with both a legal and an equitable jurisdiction, and might be considered to confer such a double jurisdiction on the supreme tribunal contemplated by the Constitution. But the text of the Constitution itself would be the source to which the people of the United States would look, when called upon to adopt it, for the benefits which they were to derive from it, and there would be no part of it which they would scrutinize more closely than that which was to establish the judicial power of the new government. If they found in it no imperative declaration making it the duty of Congress to provide for a jurisdiction in equity as well as at law, and no express adoption of such a jurisdiction for the supreme tribunal, they might well say that the character of the judicial power was left to the accidental choice of Congress, or to doubtful interpretation, instead of being expressly ordained in its full and essential proportions by the people. If a citizen of one state were to pursue a remedy in the courts of the Union against a citizen of another state, or if one state should have a judicial controversy with another, that would be a very imperfect system of judicature which should leave the form and extent of the remedy to be determined by the local law where the process was to be instituted, or which should confine the relief to the forms and proceedings of the common law. If the appellate jurisdiction of the supreme national tribunal were to be exercised over any class of controversies originating in the state courts, it was extremely important that the Constitution should expressly ascertain whether suits at law, or suits in equity, or both, were to be embraced within that appellate power. For these reasons it became necessary for



the Convention to supply this defect, by extending the judicial power, both in equity and at law, to the several cases embraced in it.

Another defect in the report of the committee—or what was regarded as a defect when the Constitution was ratified—and one which the Convention did not supply, was in the omission of any express provision for trial by jury in civil cases. Such a provision was supplied by an amendment proposed by the first Congress that assembled under the Constitution, and adopted in 1791; but it was regarded by the framers of the Constitution as inexpedient, on account of the different construction of juries in the different states, and the diversity of their usages with respect to the cases in which trial by jury was used.<sup>1</sup> It is quite possible that, after the Constitution had declared that the jurisdiction of the national tribunals should extend to all cases “in law” affecting certain parties or rights, Congress would not have been at liberty to establish inferior tribunals for the trial of cases “in law” by any other method than according to the course of the common law, which requires that the fact in such cases shall be tried by a jury. But the objection which afterwards prevailed was connected, as we shall presently see, with what was regarded as a dangerous ambiguity in the clause of the Constitution which gave to the Supreme Court its appellate jurisdiction both as to law and fact.

The plan of the committee of detail contemplated a supreme tribunal with original jurisdiction over a few of the cases within the judicial power, and appellate jurisdiction over all the other cases enumerated. Inquiry was made in the Convention whether this appellate jurisdiction was intended to embrace fact as well as law, and to extend to cases of common law as well as to those of equity and admiralty jurisdiction. The answer was given, that such was the intention of the committee, and the jurisdiction of the federal court of appeals, under the Confederation, was referred to as having been so construed. The words “both as to law and fact” were thereupon introduced into the description of the appellate power, by unanimous consent.<sup>2</sup> Various explanations were subsequently given, when the Constitution came before the people, of the force and meaning of these words. The most

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<sup>1</sup> Elliot, V. 550.

<sup>2</sup> Ibid., 488.

probable and the most acute of these explanations was that made by Hamilton in the *Federalist*,<sup>1</sup> which limited the effect of the words, in reference to common-law cases, to so much cognizance of the facts involved in a record as is implied in the application of the law to them by the appellate tribunal. But the truth was, the words were of very comprehensive import. While they were used in order to save to the Supreme Court power to revise the facts in equity and admiralty proceedings, they made no distinction, and imposed upon Congress no duty to make a distinction, between cases in equity and admiralty, and cases at common law; and although it might be true that in some states the facts in all cases were tried by a jury, and that in some cases so tried there ought to be a power to revise the facts, yet it was not conceded that such a power ought to exist over the verdicts of juries in cases of common-law jurisdiction. This explanation will serve to show the double purpose of the amendment made in 1791. The people of many of the states required an express guarantee that trial by jury should be preserved in suits at common law, and that the facts once tried by a jury should not be re-examined otherwise than according to the rules of the common law, which have established certain well-defined limits to the power of an appellate tribunal concerning the facts appearing to have been found by a jury.<sup>2</sup>

There was still another omission in the report of the committee, of great magnitude. They had included in the judicial power cases arising under the laws of the United States, but they had not embraced cases arising under the Constitution and under treaties. At the same time, the Constitution was to embrace not only the powers of the general government, but also special restrictions upon the powers of the states; and not only the Constitution itself, but the laws made in pursuance of its provisions, and all treaties made under the authority of the United States, were to be the supreme law of the land. This supremacy could only be enforced by some prescribed action of some department of the general government. The idea of a legislative arrest, or *veto*, of state laws supposed to be in conflict with some provision of the national Constitution, or with a treaty or a law of the United

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<sup>1</sup> No. 81.

<sup>2</sup> See the Seventh Amendment.

States, had been abandoned. The conformity, moreover, of the laws of Congress to the provisions of the Constitution could only be determined by the judicial power, when drawn into question in a judicial proceeding. The just and successful operation of the Constitution, therefore, required that, by some comprehensive provision, all judicial cases<sup>1</sup> arising under the Constitution, laws, or treaties of the United States—whether the question should grow out of the action of a state legislature, or the action of any department of the general government—should be brought within the cognizance of the national judiciary. This provision was added by the Convention. It completed the due proportions and efficacy of this branch of the judicial power.

Trial by jury of all criminal offences (except in cases of impeachment) had been provided for by the committee of detail, and such trial was to be had in the state where the offence had been committed. The Convention, in order to secure the same right of a jury trial in cases where the offence had been committed out of any state, provided that the trial should be at such place or places as the Congress might by law have directed.\*

These additions, with one other which included within the judicial power all cases to which the United States might be a party; the transfer of the trial of impeachments to the Senate; and the transfer to the judiciary of controversies between the states respecting jurisdiction or territory, and controversies respecting land titles claimed under the grants of different states—were the principal changes and improvements made in the plan of the committee.

The details of the arrangement will perhaps fail to interest the general reader. Yet I cannot but think that to understand the purpose and operation of this department of the national government would be a very desirable acquisition for any of my readers not already possessed of it; and having completed the description

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<sup>1</sup> By "cases arising under the Constitution," etc., the framers of that instrument did not mean all cases in which any department of the government might have occasion to act under provisions of the Constitution, but all cases *of a judicial nature*; that is, cases which, having assumed the form of judicial proceedings between party and party, involve the construction or operation of the Constitution of the United States. Elliot, V. 483.

\* Elliot, V. 484. Constitution, Art. III. § 2, clause 3.

of the mode in which the judicial power was constructed, I shall conclude this part of the subject with a brief statement of its constitutional functions.

One of the leading purposes for which this branch of the government was established was to enable the Constitution to operate upon individuals, by securing their obedience to its commands, and by protecting them in the enjoyment of the rights and privileges which it confers. The government of the United States was eminently intended, among other purposes, to secure certain personal rights, and to exact certain personal duties. The Constitution confers on the general government a few special powers, but it confers them in order that the general government may accomplish for the people of each state the advantages and blessings for which the state governments are presumed to be, and have in fact proved to be, inadequate. It lays upon the governments and people of the states certain restrictions, and it lays them for the protection of the people against an exercise of state power deemed injurious to the general welfare. The government of the United States, therefore, is not only a government which seeks to protect the welfare and happiness of the people who live under it, but it is so constructed as to make its citizens directly and individually its subjects, exacting of them certain duties, and securing to them certain rights. It comes into this relation by reason of its supreme legislative power over certain interests, and the supreme authority of its restrictions upon the powers of the states; and it is enabled to make this relation effectual through its judicial department, which can take cognizance of every duty that the Constitution exacts and of every right that it confers, whenever they have assumed a shape in which judicial power can act upon them. Let us take, as illustrations of this function of the national judiciary, a single instance of the obedience required by the Constitution, and also one of a right which it protects. The Constitution empowers Congress to lay and collect duties; which, when they are laid and incurred, become a debt due from the individual owner of the property on which they are assessed to the general government. Payment, in disputed cases, might have been left to be enforced by executive power; but the Constitution has interposed the judicial department, as the more peaceful agent, which can at once adjudicate between the government and the citi-

zen, and compel the payment of what is found due. Again, the Constitution provides that no state shall pass any law impairing the obligation of contracts. An individual supposing himself to be aggrieved by such a law might have been left to obtain such redress as the judicial or legislative authorities of the state might be disposed to give him ; but the Constitution enables him finally to resort to the national judiciary, which has power to relieve him against the operation of the law upon his personal rights, while the law itself may be left upon the statute-book of the state.

But while the judicial department of the general government was thus designed to enforce the duties and protect the rights of individuals, it is obvious that, in a system of government where such rights and duties are to be ascertained by the provisions of a fundamental law framed for the express purpose of defining the powers of the general government and of each of its departments, and establishing certain limits to the powers of the states, the mere act of determining the existence of such rights or duties may involve an adjudication upon the question, whether acts of legislative or executive power are in conformity with the requirements of the fundamental law. On the one hand, the judicial department is to see that the legislative authority of the Union does not exact of individuals duties which are not within its prescribed powers, and that no department of the general government encroaches upon the rights of any other, or upon the rights of the states ; and, on the other hand, it has to see that the legislative authority of the states does not encroach upon the powers conferred upon the general government, or violate the rights which the Constitution secures to the citizen. All this may be, and constantly is, involved in judicial inquiries into the rights, powers, functions, and duties of private citizens or public officers ; and therefore, in order that the judicial power should be able effectually to discharge its functions, it must possess authority, for the purposes of the adjudication, to declare even an act of legislation to be void, which conflicts with any provision of the Constitution.

There were great differences of opinion in the Convention upon the expediency of giving to the judges, as expositors of the Constitution, power to declare a law to be void ;<sup>1</sup> and undoubtedly

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<sup>1</sup> Elliot, V. 429.

such a power, if introduced into some governments, would be legislative in its nature, whether the persons who were to exercise it should be called judges, or be clothed with the functions of a council of revision. But under a limited and written constitution such a power, when given in the form and exercised in the mode provided for in the Constitution of the United States, is strictly judicial. This is apparent from the question that is to be determined. It arises in a judicial controversy respecting some right asserted by or against an individual; and the matter to be determined is whether an act of legislation, supposed to govern the case as law, is itself in conformity to the supreme law of the Constitution. In a government constituted like ours, this question must be determined by some one of its departments. If it be left with the executive to decide finally what laws shall be executed, because they are consistent with the Constitution, and what laws shall be suspended, because they violate the Constitution, this practical inconvenience may arise, namely, that the decision is made upon the abstract question, before a case to be governed by the law has arisen. If the legislature were empowered to determine, finally, that the laws which they enact are constitutional, the same practical difficulty would exist; and the individual, whose rights or interests may be affected by a law when put into operation, would have no opportunity to be heard upon what, in our form of government, is a purely juridical question, on which every citizen should be heard, if he desires it, before the law is enforced in his case. On the other hand, if the final and authoritative determination is postponed until the question arises in the course of a judicial controversy respecting some right or duty or power of an individual who is to be affected by the law, or who acts under it, the question itself is propounded not in the abstract, but in the concrete; not in reference to the bearing of the law upon all possible cases, but to its bearing upon the facts of a single case. In this aspect the question is of necessity strictly judicial. To withhold from the citizen a right to be heard upon the question which in our jurisprudence is called the constitutionality of a law, when that law is supposed to govern his rights or prescribe his duties, would be as unjust as it would be to deprive him of the right to be heard upon the construction of the law, or upon any other legal question that arises in the cause. The citizen lives

under the protection, and is subject to the requirements, of a written fundamental law. No department of the national, or of any state government, can lawfully act otherwise than according to the powers conferred or the restrictions imposed by that instrument. If the citizen believe himself to be aggrieved by some action of either government which he supposes to be in violation of the Constitution, and his complaint admit of judicial investigation, he must be heard upon that question, and it must be adjudicated, or there can be no administration of the laws worthy of the name of justice.

It is interesting, therefore, to observe how this function of the judicial power gives to the operation of the government a comparatively high degree of simplicity, exactness, and directness, notwithstanding the refined and complex character of the system which its framers were obliged to establish. To judge of the merits of that system, in this particular, it is necessary to recur again to those alternative measures to which I have frequently referred, and which lay directly in their path. One of these measures was that of a council of revision, to be charged with the duty of arresting improper laws. Besides the objection which has been already alluded to—that the question of the conformity of a law to the Constitution would have thus been finally passed upon in the abstract—such an institution, although theoretically confined to this inquiry, would have become practically a third legislative chamber; for it would inevitably have happened that considerations of expediency would also have found their way into the deliberations of a numerous body appointed to exercise a revisory power over all acts of legislation. There is no mode in which the question of constitutional power to enact a law can be determined, without the influence of considerations of policy or expediency, so effectually as by confining the final determination to the special operation of the law upon the facts of an individual case. When the tribunal that is to decide this question is, by the very form in which it is required to act, limited to the bearing of the law upon some right or duty of an individual placed in judgment by a record, it is at once relieved of the responsibility, and in a great degree freed from the temptation, of considering the policy of the legislation. If, therefore, it be conceded—as every one will concede—that, whatever public body is specially instituted for the

purpose of submitting the acts of the legislature to the test of the Constitution, it should neither possess the power, nor be exposed to the danger, of invading the legislative province, by acting upon motives of expediency, it must be allowed that the framers of the Constitution did wisely in rejecting the artificial, cumbrous, and hazardous project of a council of revision. The plan of such a council was, it is true, much favored, and, indeed, insisted upon, by some of the wisest men in the Convention. But it was urged at a time when the negative that was to be given to the president had not been settled, and when he had not been made sufficiently independent of the legislature to insure his unfettered employment of the negative that might be given to him. The purpose of the proposed council of revision was to strengthen his hands, by uniting the judges with him in the exercise of the "veto." This would have given to the judges a control both over the question of constitutional power and the question of legislative policy. As to the latter, it became unnecessary, as well as inexpedient, to unite the judges with the president, after he had been clothed with a suitable negative, and after his election had been taken from the legislature; and as to the former question, the final arrangement of the judicial power made it equally unnecessary to form the judges into a council of revision, since, if the president should fail to arrest an unconstitutional law, when presented for his approval, it could be tested in the ordinary course of judicial proceedings after it had gone into operation.

But the conformity of laws of Congress to the Constitution was not all that was to be secured. Some prudent and effectual means were to be devised by which the acts of the state governments could be subjected to the same test. The project of submitting the laws of the states to some department of the general government, while they were in the process of being enacted, or before they could have the form of law, was full of inconvenience and hazard. It could not have been attempted without an injury to state pride that would have aroused an inextinguishable opposition to the national authority, even if the plan could once have been assented to. Yet there was no other alternative, unless the judicial power of the general government should be so constructed as to enable it to take the same cognizance of a constitutional question, when arising upon the law of a state, that it was to take



of such a question when arising upon an act of Congress. The same necessity would exist in the one case as in the other, for a power within the general government to give practical effect to that supremacy which the Constitution was to claim for itself, for treaties, and for the laws passed in pursuance of its provisions. All the restrictions which the Constitution was to lay upon the powers of the states would be nugatory if the states themselves were to be the final judges of their meaning and operation. This transcendent power of interpretation and application, so logically necessary and yet so certain to wound and irritate if exercised by direct interference, could be wielded, without injurious results, through the agency of judicial forms, by a judicial investigation into personal rights, when affected by the action of a state government, just as it could be in reference to the acts of any department of the national government that could be made the subject of proceedings in a court of justice.

The relation of the judicial power to the execution of treaties rests upon the same grounds of paramount necessity. It is not merely for the sake of uniformity of interpretation that the national judiciary is authorized to decide finally all cases arising under treaties, although uniformity of interpretation is essential to the preservation of the public faith; but it is in order that the treaty shall be executed, by being placed beyond the hazards both of wrong construction and of interested opposition. The memorable instance of the Treaty of Peace, the absolute failure of which in point of execution, before the adoption of the Constitution, has been described in a former part of this work, presents the great illustration, in our constitutional history, of the only mode in which the supremacy of treaty stipulations as law can be maintained in our system of government. "The United States in Congress assembled," under the Confederation, had the same exclusive authority to make treaties that is now possessed by the president and the Senate under the Constitution, and a treaty was in theory as obligatory then, upon the separate states and their inhabitants, as it is now. But it has been found to be an axiom of universal application in the art of government, that a supremacy which is merely theoretical is no real supremacy. If a stipulation made by the proper authority with a foreign government is to have the force of law, requiring the obedience of individuals and of all pub-

lic authorities, its execution must be committed to a judiciary acting upon private rights without the hinderance or influence of adverse legislation.

There is another branch of the judicial power which illustrates in a striking manner the object embraced in the preamble of the Constitution, where the people of the United States declare it to be their purpose "to establish justice." This is found in the provision for a special jurisdiction over the rights of persons bearing a certain character. Like almost everything else in the Constitution, this feature of the judicial power sprang from a necessity taught by previous and severe experience. Reasoning from the mere nature of such a government as that of the United States, it might seem that the judicatures of the separate states would be sufficient for the administration of justice in all cases in which private rights alone are concerned, and by which no power or interest of the general government, and no provision of the general Constitution, is likely to be affected. But we find in the judicial power of the United States a particular jurisdiction given on account of the mere civil characters of the parties to a controversy; and its existence there is to be accounted for upon other than speculative reasons. From the Declaration of Independence to the day of the ratification of the Constitution, the judicial tribunals of the states had been unable to administer justice to foreigners, to citizens of other states, to foreign governments and their representatives, and to the governments of their sister states, so as to command the confidence and satisfy the reasonable expectations of an enlightened judgment. Hence the necessity for opening the national courts to these various classes of parties, whose different positions may now be briefly considered.

In a country of confederated states, each possessing a full power of legislation, it could not but happen—as it did constantly happen in this Union before the adoption of the Constitution—that the determination of controversies between citizens of the state where the adjudication was to be had, and citizens of another state, would be exposed to influences unfavorable to the ends of justice. In truth, one of the parties in such a controversy was virtually an alien in the tribunal which he was obliged to enter; for although the Articles of Confederation undertook to secure to the free inhabitants of each state all the privileges and immunities

of free citizens in the several states, yet it is obvious that the efficacy of such a provision must depend almost wholly upon the spirit of the tribunals, and upon their capacity to give effect to such a declaration of rights, against a course of state policy or the positive enactments of a state code. The chief difficulty of the condition of affairs existing before the Constitution lay not so much in the hazards of a violation of principle through local prejudice, or the superior force of local policy or legislation—although these influences were always powerful—as in the fact that, when these influences were likely to be most active, or were most feared, there was no tribunal to which resort could be had, and which was known to be beyond their operation and their reach. The articles of compact between the states had intended to remove from the citizens of the different states the disabilities of practical alienage under which they would have stood in the tribunals of each other. But with that mere declaration those articles stopped. If the litigant saw that the local law was likely to be administered to him as if he were a foreigner, or feared that the scales of justice would not be held with an impartial hand, he could go nowhere else for a decision. This was a great evil; for much of the value of every judicature depends upon the confidence it inspires.

There were still other and perhaps stronger reasons for creating an independent jurisdiction, to be resorted to by foreigners, in controversies with citizens of the states. No clause in the Constitution was to make them equal in rights with citizens, and for the very reason of their alienage, therefore, it was necessary to give them access to tribunals organized under the authority of the general government, which would be responsible to foreign powers for the treatment that their subjects might receive in the United States. Ambassadors, too, and other foreign ministers, would not only be aliens, but would possess the character of representatives of their sovereigns; and consuls would be the public agents of their governments, although not bearing the diplomatic character. These functionaries were therefore permitted to resort to the judicial power of the United States; and for the purpose of more effectually protecting the national interests that might be involved in their personal or official relations, original jurisdiction was given to the Supreme Court in all cases affecting them.

In addition to these there were other controversies which,

as we have seen, were included within the judicial power of the United States, on account of the character of the parties: namely, those to which the United States might be a party; those to which a state of the Union might be a party, where the opposite party was another state of the Union, or a citizen of another state of the Union, or a foreign state or its citizens or subjects; and those between citizens of a state of the Union and foreign states, citizens, or subjects. Finally, controversies between citizens of the same state claiming lands under grants of different states were placed under the same jurisdiction for similar reasons; because the state tribunals could not be expected to afford that degree of impartiality which the circumstances of these several cases required.

There remains only one other branch of the jurisdiction conferred by the Constitution on the tribunals of the United States which it is necessary to notice: namely, the admiralty and maritime jurisdiction. With respect to the criminal jurisdiction in admiralty, in cases of piracies and felonies committed on the high seas, and the prize jurisdiction, the Articles of Confederation had given to the Congress the exclusive power of appointing courts for the trial of the former, and for hearing and finally determining appeals in all cases of capture. Such appeals were taken from the state courts of admiralty, tribunals which also possessed and exercised a civil jurisdiction corresponding to that of the admiralty in England, but in practice somewhat more extensive. When the Constitution was framed it was perceived to be expedient, on account of the relation of maritime commerce to the intercourse of the people of the United States with foreign nations, or to the intercourse of the people of different states with each other, to give the whole civil as well as criminal jurisdiction in admiralty, and the entire prize jurisdiction, original as well as appellate, to the government of the Union. This was effected by the comprehensive provision which gives the judicial power cognizance of "all cases of admiralty and maritime jurisdiction;" expressions which have often been, and are still likely to be, the subject of controversy with respect to the particular transactions, of a civil nature, intended to be embraced in the jurisdiction, but in reference to which there is nothing in the known proceedings of the Convention, other than what is to be inferred from the language selected, that affords any special evidence of the intention of the framers of the Constitution.

## CHAPTER XXXI.

### REPORT OF THE COMMITTEE OF DETAIL, CONTINUED.—EFFECT OF RECORDS.—INTER-STATE PRIVILEGES.—FUGITIVES FROM JUSTICE AND FROM SERVICE.

WE now come to a class of provisions designed to place the people of the separate states in better relations with each other, by removing, in some degree, the consequences that would otherwise flow from their distinct and independent jurisdictions. This was to be done by causing the rights and benefits resulting from the laws of each state to be, for some purposes, respected in every other state. In other words, by the establishment and effect of certain exceptions, the general rule which absolves an independent government from any obligation to regard the law, the authority, or the policy of another government was, for some purposes, to be obviated between the states of the American Union.

To some extent this had been attempted by the Articles of Confederation, by providing: first, that the free inhabitants of each of the states (paupers, vagabonds, and fugitives from justice excepted) should be entitled to all privileges and immunities of free citizens in the several states, and that the people of each state should have free ingress and regress to and from any other state, and the same privileges of trade and commerce as its inhabitants; secondly, that fugitives from justice charged with certain enumerated crimes, and escaping from one state into another, should be given up, on demand of the executive of the state from which they had escaped; and, thirdly, that full faith and credit should be given in each state to the records, acts, and judicial proceedings of the courts and magistrates of every other state.

The Confederation, however, was a “firm league of friendship with each other,” entered into by separate states, and the object of the provisions above cited was “the better to secure and perpetuate mutual friendship and intercourse among the people” of

those states. One of the purposes of the Constitution, on the other hand, was "to form a more perfect Union;" and we are therefore to expect to find its framers enlarging and increasing the scope of these provisions, and giving to them greater precision and vigor. We shall see, also, that they made a very important addition to their number.

The first thing that was done was to make the language of the Confederation respecting the privileges of general citizenship somewhat more precise. The Articles of Confederation had made "the free *inhabitants* of each state," with certain exceptions, entitled to the privileges and immunities of "free *citizens* in the several states."<sup>1</sup> It is probable that these two expressions were intended to be used in the same sense, and that by "free inhabitants" of a state was meant its "free citizens." The framers of the Constitution substituted the latter expression for the former, and thus designated more accurately the persons who are to enjoy the privileges and immunities of free citizens in other states besides their own.

In the next place, while the Articles of Confederation declared that full faith should be given in each state to the acts, records, and judicial proceedings of every other state, they neither prescribed the mode in which the proof was to be made, nor the effect when it had been made. The committee of detail, in preparing the first draft of the Constitution, merely adopted the naked declaration of the Articles. The Convention added to it the further provision which enabled Congress to prescribe by general laws the manner in which such acts, records, and proceedings shall be proved, and the effect to be given to them when proved.<sup>2</sup>

With respect to fugitives from justice, the Articles of Confed-

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<sup>1</sup> See and compare Art. IV. of the Confederation and Art. IV. § 2 of the Constitution.

<sup>2</sup> So far as the proceedings in the Convention are to be regarded as a guide to construction, it appears clearly that the clause which empowers Congress to "prescribe the manner in which such acts, records, and proceedings shall be proved, and the effect thereof," was intended to give a power to declare the effect of the acts, records, and judicial proceedings of any state, when offered in evidence in another state, as well as to prescribe the mode of proving them. See Elliot, V. 487, 488, 503, 504. See also a learned discussion on this clause in Story's Commentaries, §§ 1302-1313.

eration had specified persons "charged with treason, felony, or other high misdemeanor in any state," as those who were to be given up by the states to each other. For the purpose of avoiding the ambiguity of this language, the provision was made to embrace all other crimes, as well as treason and felony.<sup>1</sup>

Besides correcting and enlarging these provisions, the framers of the Constitution introduced into the system of the Union a special feature, which, in the relations *of the states to each other*, was then entirely novel, although not without precedent. I refer to the clause requiring the extradition of "fugitives from service," who have escaped from one state into another.

In describing the compromises of the Constitution relating to slavery I have not placed this provision among them, because it was not a part of the arrangement by which certain powers were conceded to the Union by one class of states, in consideration of certain concessions made by another class. It is a provision standing by itself, in respect to its origin, about which there was formerly some misapprehension. Its history is as follows :

In many of the discussions that had taken place in preparing the outline of the government that was sent to the committee of detail, a good deal of jealousy had been felt and expressed by some of the Southern members, not only with regard to the relative weight of their states in the representative system, but also with respect to the security of their slave property. Slavery, although it had existed in all of the states, and although there still remained in all of them excepting Massachusetts some persons of the African race still held in that condition, was likely soon to disappear from the states of New Hampshire, Rhode Island, Connecticut, New York, and Pennsylvania, under changes that would be introduced by their constitutions or by statutory provision. In the whole of New England, therefore, and in nearly all of the Middle States excepting Maryland, if the principles of the common law and of the law of nations were to be applied to such cases, the relation of master and slave, existing under the law of another state, could not be recognized, and there could be no means of enforcing a return to the jurisdiction which gave to the master a right to the custody and services of the slave. At the

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<sup>1</sup> Elliot, V. 487.

same time, it was apparent that, in the five states of Maryland, Virginia, North Carolina, South Carolina, and Georgia, slavery would not only be likely to continue for a very long period of time, but that this form of labor constituted, and would be likely long to constitute, a necessary part of their social system. The theory on which the previous Union had been framed, and on which the new Union now intended to be consummated was expressly to be founded, was, that the domestic institutions of the states were exclusively matters of state jurisdiction. But if a relation between persons, existing by the law of a particular state, was to be broken up by an escape into another state, by reason of the fact that such a relation was unknown to or prohibited by the law of the place to which the party had fled, it was obvious that this theory of the Union would be of very little practical value to the states in which such a relation was to exist and to be one of great importance. If the territory of every state in which this relation was not to be recognized were to be made an asylum for fugitives, the right of the master to the services of the slave would be wholly insecure.

It was in reference to this anticipated condition of things that General Pinckney of South Carolina, at the time when the principles that were to be the basis of the Constitution were sent to the committee of detail<sup>1</sup> gave notice that, unless some provision should be inserted in their report to prevent this consequential emancipation, he should vote against the Constitution. Considering the position and influence of this gentleman, his declaration was equivalent to a notice that, without such a provision, the Constitution would not be accepted by the state which he represented. Still, the committee of detail omitted to make any such special provision in their report of a constitution, and inserted only a general article that the *citizens* of each state should be entitled to all the privileges and immunities of citizens in the several states.<sup>2</sup> General Pinckney was not satisfied with this, and renewed his demand for a provision "in favor of property in slaves."<sup>3</sup> But the article

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<sup>1</sup> July 23d. Elliot, V. 357.

<sup>2</sup> Art. XIV. of the report of the committee of detail.

<sup>3</sup> These are the words of Mr. Madison's Minutes. Elliot, V. 487. This was on the 26th of August.



was adopted, South Carolina voting against it, and the vote of Georgia being divided.

As soon, however, as the next article was taken up, which required the surrender of fugitives from justice escaping from one state into another, the South Carolina members moved to require "fugitive slaves and servants to be delivered up, like criminals."<sup>1</sup> Objection was made that this would require the executive of the state to do it at the public expense,<sup>2</sup> and that there was no more propriety in the public seizing and surrendering a slave or a servant, than a horse.<sup>3</sup> The proposition was then withdrawn, in order that a particular provision might be framed, apart from the article requiring the surrender of fugitives from justice. That article was then adopted without opposition.<sup>4</sup>

For a provision respecting fugitives from service, the movers had two remarkable precedents to which they could resort, and which had settled the correctness of the principle involved. Negro slavery, as well as other forms of service, had existed in the New England colonies at a very early period. In 1643 the four colonies of Massachusetts Bay, Plymouth, Connecticut, and New Haven had formed a confederation, in which, among other things, they had mutually stipulated with each other for the restoration of runaway "servants;" and there is indubitable evidence that African slaves, as well as other persons in servitude, were included in this provision.

The other precedent was found in the ordinance which had just been adopted by Congress for the settlement and government of the territory northwest of the river Ohio; in which, when legislating for the perpetual exclusion of "slavery or involuntary servitude," a similar provision was made for the surrender of persons, escaping into the territory, "from whom labor or service is lawfully claimed in any one of the original states."

In making this provision the early colonists of New England, and the Congress of the Confederation, had acted upon a principle directly opposite to the objection that was raised in the formation of the Constitution of the United States. When it was said

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<sup>1</sup> Madison, *ut supra*. The motion was made by Butler and Pinckney, according to Mr. Madison.

<sup>2</sup> By Wilson.

<sup>3</sup> By Sherman.

<sup>4</sup> Madison, *ut supra*. August 28.

in the Convention that the public authority ought no more to interfere and surrender a fugitive slave or servant than a horse, it was forgotten that, by the principles of the common law and the comity of nations, not only is property in movable things recognized by civilized states, but a remedy is afforded for restitution. But in the case of a fugitive person, from whom, by the law of the community from which he escapes, service is due to another, the right to the service is not recognized by the common law or the law of nations, and no means exist of enforcing the duties of the relation. If the case is to be met at all, therefore, it can only be by a special provision, in the nature of a treaty, which will so far admit the relation and the claim of service as to make them the foundation of a right to restore the individual to the jurisdiction of that law which recognizes and enforces its duties.

This was precisely what was done by the New England Confederation of 1643, and the Ordinance of 1787; and it was what was now proposed to be done by the Constitution of the United States. It was regarded at the time by the Southern States as absolutely necessary to secure to them their right of exclusive control over the question of emancipation,<sup>1</sup> and it was adopted in the Convention by unanimous consent,<sup>2</sup> for the express purpose of protecting a right that would otherwise have been without a satisfactory security. A proper understanding of the grounds of this somewhat peculiar provision is quite important.

The publicists of Christendom are universally agreed that independent nations are under no positive obligation to support the institutions, or to enforce the municipal laws, of each other. So far does this negative principle extend, that the general law of nations does not even require the extradition of fugitive criminals who have escaped from one country into another. If compacts are made for this purpose they rest entirely upon comity, and upon those considerations of public policy which make it expedient to expel from our own borders those who have violated the great laws on which the welfare of society depends; and such

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<sup>1</sup> Mr. Madison stated in the Convention of Virginia in which the Constitution was ratified that "this clause was expressly inserted to enable owners of slaves to reclaim them." Elliot's Debates, III. 453.

<sup>2</sup> August 29th. Elliot, V. 492.

compacts are usually limited to those offences which imply great moral as well as civil guilt. The general rule is, that a nation is not obliged to surrender those who have taken sanctuary in its dominions. At the same time every political state has an undoubted right to forbid the entry into its territories of any person whose presence may injure its welfare or thwart its policy. No foreigner, whether he comes as a fugitive escaping from the violated laws of another country, or comes for the innocent purposes of travel or residence, can demand a sanctuary as a matter of right. Whether he is to remain, or not to remain, depends entirely upon the discretion of the state to which he has resorted—a discretion that is regulated by a general principle among Christian nations, while at the same time the general principle is subject to such exceptions as the national interest may require to be established.

Slavery, or involuntary servitude, being considered by public law as contrary to natural right, and being a relation that depends wholly on municipal law, falls entirely within the principle which relieves independent nations of the obligation to support or to enforce each other's laws. It has not, therefore, been customary for states which have no peculiar connection to surrender fugitives from that relation, or to do anything to enforce its duties. But such fugitives stand upon a precise equality with all other strangers who seek to enter a society of which they are not members. If the welfare of the society demands their exclusion, or if it may be promoted by a stipulation that they shall be taken back to the place where their service is lawfully due, the right to exclude or to surrender them is perfect; for every political society has the moral power, and is under a moral obligation, to provide for its own welfare. If such stipulations have not usually been made among independent nations, their absence may prove that the public interest has not required them, but it does not prove the want of a right to make them.

Each of the American states, when its people adopted the national Constitution, possessed the right that belongs to every political society, of determining what persons should be permitted to enter its territories. Each of them had a complete right to judge for itself how far it would go, in recognizing or aiding the laws or institutions of the other states. It is obvious, moreover,

that states which are in general independent of each other, but which propose to enter into national relations with each other under a common government, for certain great political and social ends, may have reasons for giving a particular effect to each other's institutions, which do not operate with societies not standing in such a relation; and that these reasons may be of a character so grave and important as to amount to a moral obligation. Thus independent and disconnected nations are ordinarily under no obligation to support or guarantee each other's forms of government. But the American states, in entering into the new Union under their national Constitution, found that a republican form of government in every state was a thing so essential to the welfare and safety of all of them as to make it both a necessity and a duty for all to guarantee that form of government to each other. In the same way, although nations in general do not recognize the relation of master and servant prevailing by the law of another country, so far as to stipulate for the surrender of persons escaping from that relation, the American states found themselves surrounded by circumstances so imperative as to make it both a necessity and a duty to make with each other that stipulation. These circumstances I shall now briefly state.

I have already referred to all the known proceedings in the Convention on this subject, and have stated to what extent those proceedings justify the opinion that the Constitution could not have been formed without this provision. But there is higher evidence both of its necessity and its propriety than anything that may have been said by individuals or delegations. The states were about to establish a more perfect union, under a peculiar form of national government, the effect of which would necessarily bring them into closer relations with each other, multiplying greatly the means and opportunities of intercourse, and enabling them to act on each other's internal condition with an influence that would be nearly irresistible, unless it should be arrested by constitutional barriers. Among the features of their internal condition the relation of master and servant, or the local institution of servitude, was one that must either be placed under national cognizance, or be left exclusively to the local authority of each state. There was no middle or debatable ground which it could with safety be suffered to occupy. The African race, although

scattered throughout all of the states, was placed in very different circumstances in different parts of the country. There could have been no national legislation with respect to that race, concerning the time or mode of emancipation, the tenure of the master's right, or the treatment of the slave, that would not have been forced to adapt itself to an almost endless variety of circumstances in different localities. At the same time it was one of the fundamental principles on which the whole Constitution was proposed to be founded, that, where the national authority could not furnish a uniform rule, its legislative power was not to extend. Whatever required one rule in Massachusetts and another rule in Virginia for the exigencies of society was necessarily left to the separate authority of the respective states. It was upon matters on which the states could not legislate alike, but on which the national power could furnish a safe and advantageous uniform rule, that the want of a national Constitution was felt, and for these alone was its legislative power to be created.

We may suppose, then, that the framers of the Constitution had sought to bring the relation of master and servant, or the condition of the African race, within the states, under the cognizance of national legislation; and we may imagine, for the purposes of the argument, that consent had been given by every one of the states. The power must have remained dormant, or its exercise would have been positively mischievous. It never could have been exercised beneficially for either of the two races; not only because it could not have followed any uniform system, but because the confusions and jealousies which must have attended any attempt to legislate specially must either have totally obstructed the power, or must have made its exercise absolutely pernicious. These consequences, which the least reflection will reveal, may serve to show us, far better than any declarations or debates, why the framers of the Constitution studiously avoided acquiring any power over the institution of slavery in the states; why the representatives of one class of states could not have consented to give, and the representatives of another class could never have desired to obtain, such a power for the national Constitution.

Slavery has been eliminated from the social system of every state in the Union, by a process very different from any that could have been foreseen at the time of the formation and adop-

tion of our national Constitution. The principle which lay at the foundation of the arrangements and compromises of the Constitution was that to secure to every state the uncontrolled right to regulate the civil *status* of its own inhabitants was the most effectual means to guard against the calamity of civil war. How, notwithstanding the force and necessity of this safeguard, a civil war was brought about, and how it ended in the sudden abolition of slavery by an exertion of the national will, thereby displacing its gradual extinction under the authority of each state in which it had existed, it belongs to a subsequent part of this history to describe. It belongs, also, to a future chapter to consider what, if any, degree of inconsistency, moral or political, ought to be imputed to the framers of the Constitution and the generation which established it, because they confined the enjoyment of civil rights to a single race of men, instead of extending them to all men of all races.

## CHAPTER XXXII.

REPORT OF THE COMMITTEE OF DETAIL, CONCLUDED. — GUARANTEE OF REPUBLICAN GOVERNMENT AND INTERNAL TRANQUILLITY.— OATH TO SUPPORT THE CONSTITUTION.—MODE OF AMENDMENT.— RATIFICATION AND ESTABLISHMENT OF THE CONSTITUTION.—SIGNING BY THE MEMBERS OF THE CONVENTION.

THE power and duty of the United States to guarantee a republican form of government to each state, and to protect each state against invasion and domestic violence, had been declared by a resolution, the general purpose of which has been already described. It should be said here, however, that the objects of such a provision were two: first, to prevent the establishment in any state of any form of government not essentially republican in its character, whether by the action of a minority or of a majority of the inhabitants; second, to protect the state against invasion from without, and against every form of domestic violence.<sup>1</sup> When the committee of detail came to give effect to the resolution, they prepared an article which made it the duty of the United States to guarantee to each state a republican form of government, and to protect each state against invasion, without any application from its authorities; and to protect the state against domestic violence, on the application of its legislature.<sup>2</sup> No change was made by the Convention in the substance of this article, excepting to provide that the application, in a case of domestic violence, may be made by the executive of the state when the legislature cannot be convened.<sup>3</sup>

It now remains for me to state what appears to have been the meaning of the framers of the Constitution, embraced in these

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<sup>1</sup> Elliot, V. 332, 333.

<sup>2</sup> First draft of the Constitution, Art. XVIII. Elliot, V. 381.

<sup>3</sup> Constitution, Art. IV. § 4.

provisions. It is apparent, then, from all the proceedings and discussions on this subject that, by guaranteeing a republican form of government, it was not intended to maintain the existing constitutions of the states against all changes. This would have been to exercise a control over the sovereignty of the people of a state, inconsistent with the nature and purposes of the Union. The people must be left entirely free to change their fundamental law, at their own pleasure, subject only to the condition that they continue the republican form of government. The question arises then, what is that form? Does it imply the existence of some organic law, establishing the departments of a government and prescribing their powers, or does it admit of a form of the body politic under which the public will may be declared from time to time, either with or without the agency of any established organs or representatives? Is it competent to a state to abolish altogether that body of its fundamental law which we call its constitution, and to proceed as a mere democracy, enacting, expounding, and executing laws by the direct action of the people, and without the intervention of any representative system constituting what is known as a government?

The Constitution of the United States assumes, in so many of its provisions, that the states will possess organized governments, in which legislative, executive, and judicial departments will be known and established, that it must be taken for granted that the existence of such agents of the public will is a necessary feature of a state government, within the meaning of this clause. No state could participate in the government of the Union without at least two of these agents, namely, a legislature and an executive; for the people of a state, acting in their primary capacity, could not appoint a senator of the United States; nor fill a vacancy in the office of senator; nor appoint electors of the president of the United States, without the previous designation by a legislature of the mode in which such electors were to be chosen; nor apply to the government of the United States to protect them against "domestic violence," through any other agent than the legislature or the executive of the state. It is manifest, therefore, that each state must have a government, containing at least these distinct departments; and whether this government is organized periodically, under mere laws perpetually re-enacted, and subject



to perpetual changes without reference to forms, or under standing and fundamental laws, changeable only in a prescribed form, and being so far what is called a constitution, it is apparent that there must be a "form of government" possessed of these distinct agencies.

There must be, moreover, not only this "form of government," but it must be a "republican" form; and in order to determine the sense in which this term qualifies the nature of the government in other respects besides those already referred to, it is necessary to take into view the previous history of American political institutions, because that history shows what is meant, in the American sense, by a "republican" government.

History, then, establishes the fact that, in the American system of government, the people are regarded as the sole original source of all political authority; that all legitimate government must rest upon their will. But it also teaches that the will of the people is to be exercised through representative forms. For even in the exercise of original suffrage, which has never been universal in any of the states of the Union, and in the bestowal of power upon particular organs, those who are regarded as competent to express the will of society are, in that expression, deemed to represent all its members; and those who, in the distribution of political functions, exercise the sovereignty of the people so far as it has been thus imparted to them, exercise a representative function to which they are appointed, directly or indirectly, by popular suffrage, that may be more or less restricted, according to the public will. It may be said, therefore, with strictness, that in the American system a republican government is one based on the right of the people to govern themselves, but requiring that right to be exercised through public organs of a representative character; and these organs constitute the government. How much or how little power shall be imparted to this government, what restrictions shall be imposed upon it, and what the precise functions of its several departments shall be, with respect to the internal concerns of the state, the Constitution of the United States leaves untouched, except in a few particulars. It merely declares that a government having the essential characteristics of an American republican system shall be guaranteed by the United States; that is to say, that no other shall be permitted to be established.

The provision by which the state is protected against domestic violence was necessary to complete the republican character of the system intended to be upheld. The Constitution of the United States assumes that the governments of the states, existing when it goes into operation, are rightfully in the exercise of the authority of the state, and will so continue until they are changed. But it means that no change shall be made by force, by public commotion, or by setting aside the authority of the existing government. It recognizes the right of that government to be protected against domestic violence; in which expression is to be included every species of force directed against that government, excepting the will of the people operating to change it through the forms of constitutional action.

The next topic on which the Convention was required to act was the question whether the Constitution should be made capable of amendment, and in what mode amendments were to be proposed and adopted. The Confederation, from its nature as a league between states otherwise independent of each other, was made incapable of alteration excepting by the unanimous consent of the states. It affords a striking illustration of the different character of the government established by the Constitution that a mode was devised by which changes in the organic law could become obligatory upon all the states, by the action of a less number than the whole.

The frame of government which the members of the Convention were endeavoring to establish, if once adopted, was to endure, as a continuing power, indefinitely; and that it might, as far as possible, be placed beyond the danger of destruction, it was necessary to make it subject to such peaceful changes as experience might render proper, and which, by being made capable of introduction by the organic law itself, would preserve the identity of the government. The existence and operation of a prescribed method of changing particular features of a government mark the line between amendment and revolution, and render a resort to the latter, for the purpose of melioration or reform, save in extreme cases of oppression, unnecessary. According to our American theory of government, revolution and amendment both rest upon the doctrine that the people are the source of all political power, and each of them is the exercise of an ultimate right.

But this right is exercised, in the process of amendment, in a prescribed form, which preserves the continuity of the existing government, and changes only such of its fundamental rules as require revision, without the destruction of any public or private rights that may have become vested under the former rule. Revolution, on the contrary, proceeds without form, is the violent disruption of the obligations resting on the authority of the former government, and terminates its existence often without saving any of the rights which may have grown up under it. The question, therefore, whether the Constitution should be made capable of amendment, was identical with the question whether some mode of amending it should be prescribed in the instrument itself, since, without an ascertained and limited method of proceeding, all change becomes, in effect, revolution; and this was accordingly, in substance, the same as the question whether revolution should be the only method by which the American people could ever modify their system of government, when in the progress of time changes might become indispensable.

It was originally proposed in the Convention that provision should be made for amending the Constitution without requiring the assent of the national legislature.<sup>1</sup> But this was justly regarded as a very important question, and the Convention came to no other decision, when the committee of detail were instructed, than to declare that provision ought to be made for amending the Constitution whenever it should seem necessary.<sup>2</sup> The mode selected by the committee, and embraced in the first draft of the instrument, was to have a convention called by the Congress, when applied for by the legislatures of two thirds of the states; but they did not declare whether the legislatures were to propose amendments and the Convention was to adopt them, or whether the Convention was both to propose and adopt them, or only to propose them for adoption by some other body or bodies not specified. There lay, therefore, at the basis of this whole subject, the very grave question whether there should ever be another national convention, to act in any manner upon or in reference to the national Constitution, after its adoption, and, if so, what its functions and authority were to be. There would follow, also,

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<sup>1</sup> Elliot, V. 157.

<sup>2</sup> Ibid., 376.

the further question, whether this should be the sole method in which the Constitution should be made capable of amendment. Several reasons concurred to render it highly inexpedient to make a resort to a convention the sole method of reaching amendments, and we can now see that the decision that was made on this subject was a wise one. It was a rare combination of circumstances that gave to the first national Convention its success. The war of the Revolution, and the exigencies which it caused, had produced a class of men possessing an influence, as well as qualifications for the duty assigned to them, that would not be likely to be again witnessed. Of these men Washington was the head; and no second Washington could be looked for. The peculiar crisis, too, occasioned by the total failure of the Confederation, notwithstanding the apparent fitness and actual necessity of that government at the time of its formation, could never occur again. There were, moreover, but thirteen states in the Confederacy, nearly all of which dated their settlement and their existence as political communities from about the same period, and all had passed through the same revolutionary history. But the number of the states was evidently destined to be greatly increased, and the new members of the Union would also be likely to be somewhat different in character from the old states. It was not probable, therefore, that the time would ever arrive when the people of the United States would feel that another national convention, for the purpose of acting on the national Constitution, would be safe or practicable. Still, it would not have been proper to have excluded the possibility of a resort to this method of amendment; since the national legislature might itself be interested to perpetuate abuses springing from defects in the Constitution, and to incur the hazards attending a convention might become a far less evil than the continuance of such abuses, or the failure to make the necessary reforms.

But it was indispensable that the precise functions and authority of such a convention should be defined, lest its action might result in revolution. The method of amendment proposed by the committee of detail did not enable the Congress to call a convention on their own motion, and did not prescribe the action of such a body, or provide any mode in which the amendments proposed by it should be adopted. Hamilton and Madison both opposed

this plan: the former, because it was inadequate, and because he considered it desirable that a much easier method should be devised for remedying the defects that would become apparent in the new system; the latter, on account of the vagueness of the plan itself. Accordingly Mr. Madison brought forward, as a substitute, a method of proceeding which, with some modifications, became what is now the fifth article of the Constitution: namely, that the Congress, whenever two thirds of both houses shall deem it necessary, shall propose amendments; or, on the application of the legislatures of two thirds of the states, shall call a convention for proposing amendments. In either case the amendments proposed are to become valid as part of the Constitution, when ratified by the legislatures of three fourths of the states, or by conventions in three fourths of the states, as the one or the other mode of ratification may be proposed by the Congress.<sup>1</sup>

But when this provision had been agreed upon, the grave question arose, whether the power of amendment was to be subjected to any limitations. There were two objects in respect to which, as we have more than once had occasion to see, different classes of the states felt great jealousy. One of them had been covered by the stipulations that the states should not be prohibited before the year 1808 from admitting further importations of slaves, and that no capitation or other direct tax should be laid unless in proportion to the census or enumeration of the inhabitants of the states, in which three fifths only of the slaves were included.<sup>2</sup> The other was the equality of representation in the Senate, so long and at length so successfully contended for by the smaller states.<sup>3</sup> At the instance of Mr. Rutledge of South Carolina a proviso was added, which forbade any amendment before the year 1808 affecting in any manner the clauses relating to the slave-trade and the capitation or other direct taxes.<sup>4</sup> This proviso having now become inoperative, those clauses are, like others, subject to amendment. At the instance of Mr. Sherman of Connecticut a restriction that is of perpetual force was placed upon the power of amendment, which prevents each state from being deprived of its equality of representation in the Senate without its consent.<sup>5</sup>

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<sup>1</sup> Elliot, V. 530-532.

<sup>2</sup> Constitution, Art. I. § 9.

<sup>3</sup> Ibid., Art. I. § 3.

<sup>4</sup> Elliot, V. 532.

<sup>5</sup> Ibid., 551, 552. Constitution, Art. I. § 3.

The oath or affirmation to support the Constitution was provided for by the committee of detail, in accordance with the resolution directing that it should be taken by the members of both houses of Congress and of the state legislatures, and by all executive and judicial officers of the United States and of the several states; and for the purpose of forever preventing any connection between church and state, and any scrutiny into men's religious opinions, the Convention unanimously added the clause, that "no religious test shall ever be required as a qualification to any office or public trust under the United States."<sup>1</sup>

We are next to ascertain in what mode the Constitution, which had thus been framed, was to provide for its own establishment and authority. There is a great difference between the importance of this question as it presented itself to the framers of the Constitution, and its importance to this or any succeeding generation. To us it is chiefly interesting because it displays the basis of a government which has been established for a century over the thirteen original states of the Confederacy, and is now established over thirty-eight. To those who made the Constitution, and to the people who were to vote upon it and to put it in operation, the mode in which it was to become the organic law of the Union was a topic of serious import and delicacy. It involved the questions, of what course would be politic with reference to the people; of what would be practicable; of the initiation of the new government without force; of its establishment on a firm, just, and legitimate authority; and of its right to supersede the Confederation, without a breach of faith towards the members of that body by whose inhabitants the new system might be rejected.

The Convention had already decided that the Constitution must be ratified by the people of the states; but a difficulty had all along existed, in the opinions held by some of the members respecting the compact then subsisting between the states, which they regarded as indissoluble but by the consent of all the parties to it. The resolution, which the committee of detail were instructed to carry out, had declared that the new plan of government should first be submitted to the approbation of the existing

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<sup>1</sup> Constitution, Art. VI.

Congress, and then to assemblies of representatives to be recommended by the state legislatures and to be expressly chosen by the people to consider and decide upon it. But this direction embraced no decision of the question whether the ratification by the people of a less number than all the states should be sufficient for putting the government into operation. If the people of a smaller number than the whole of the states could establish this form of government, what was to be its future relation to the states which might reject or refuse to consider it? Could any number of the states thus withdraw themselves from the Confederation, and establish for themselves a new general government, and could that government have any authority over the rest? Various and widely opposite theories were maintained. One opinion was that all the states must accept the Constitution, or it would be a nullity; another, that a majority of the states might establish it, and so bind the minority, upon the principle that the Union was a society subject to the control of the greater part of its members; still another, that the states which might ratify it would bind themselves, but no one else.

The truth with regard to these questions, which perplexed the minds of men in that assembly somewhat in proportion to their acuteness and their proneness to metaphysical speculations, was in reality not very far off. The Articles of Confederation had certainly declared that no alteration should be made in any of them, unless first proposed by the Congress, and afterwards unanimously agreed to by the state legislatures. But in two very important particulars the Convention had already passed beyond what could be deemed an alteration of those articles. They had prepared and were about to propose a system of government that would not merely alter, but would abolish and supersede, the Confederation; and they had determined to obtain, what they regarded as a legitimate authority for this purpose, the consent of the people of the states, by whose will the state governments existed, from whom those governments derived their authority to enter into the compact of the Confederation, and whose sovereign right to ameliorate their own political condition could not be disputed. This system they intended should be offered to all. The refusal of some states to accept it could not, upon principles of natural justice and right, oblige the others to remain fettered to a government which had

been pronounced by twelve of the thirteen legislatures to be defective and inadequate to the exigencies of the Union. At the same time the independent political existence of the people of each state made it impossible to treat them as a minority subject to the power of such majority as would be formed by the states that might adopt the Constitution. If the people of a state should ratify it, they would be bound by it. If they should refuse to ratify it, they would simply remain out of the new union that would be formed by the rest. It was, therefore, determined that the Constitution should undertake to be in force only in those states by whose inhabitants it might be adopted.<sup>1</sup>

Then came the question, in what mode the assent of the people of the states was to be given. The constitution of one of the states<sup>2</sup> provided that it should be altered only in a prescribed mode; and it was said that the adoption of the Constitution now proposed would involve extensive changes in the constitution of every state. This was equally true of the constitutions of those states which had provided no mode for making such changes, and in which the state officers were all bound by oath to support the existing constitution. These difficulties, however, were by no means insurmountable. It was universally acknowledged that the people of a state were the fountain of all political power, and if, in the method of appealing to them, the consent of the state government that such appeal should be made were involved, there could be no question that the proceeding would be in accordance with what had always been regarded as a cardinal principle of American liberty. For, since the birth of that liberty, it had been always assumed that, when it has become necessary to ascertain the will of the people on a new exigency, it is for the existing legislative power to provide for it by an ordinary act of legislation.<sup>3</sup>

Whatever changes, therefore, in the state constitutions might become necessary in consequence of the adoption of the national Constitution, it would be a just presumption that the will of the people, duly ascertained by their legislature, had decided, by that adoption, that such changes should be made; and the formal act of making them could follow at any time when arrangements

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<sup>1</sup> Elliot, V. 499.

<sup>2</sup> Maryland.

<sup>3</sup> Works of Daniel Webster, VI. 227.



might be made for it. But if no mode of ratification of the national Constitution were to be prescribed, and it were left to each state to act upon it in any manner that it might prefer, there would be no uniformity in the mode of creating the new government in the different states; and if the Convention and the Congress were to refer its adoption to the state legislatures, it would not rest on the direct authority of the people. For these reasons the Convention adhered to the plan of having the Constitution submitted directly to assemblies of representatives of the people in each state, chosen for the express purpose of deciding on its adoption.<sup>1</sup>

There was still another question, of great practical importance, to be determined. Was the Constitution to go into operation at all, unless adopted by all the states, and if so, what number should be sufficient for its establishment? It appeared clearly enough that to require a unanimous adoption would defeat all the labors of the Convention. Rhode Island had taken no part in the formation of the Constitution, and could not be expected to ratify it. New York had not been represented for some weeks in the Convention, and it was at least doubtful how the people of that state would receive the proposed system, to which a majority of their delegates had declared themselves to be strenuously opposed.<sup>2</sup> Maryland continued to be present in the Convention, and a majority of her delegates still supported the Constitution; but Luther Martin confidently predicted its rejection by the state, and it was evident that his utmost energies would be put forth against it. Under these circumstances, to have required a unanimous adoption by the states would have been fatal to the experiment of creating a new government. Some of the members were in favor of such a number as would form both a majority of the states and a majority of the people of the United States. But there was an

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<sup>1</sup> The vote, however, was only six states to four. Elliot, V. 500.

<sup>2</sup> Two of the New York delegates, Messrs. Yates and Lansing, left the Convention on the 5th of July. Hamilton had previously returned to the city of New York, on private business. He left June 29th and returned August 13th. It appears from his correspondence that he was again in the city of New York on the 20th of August, and that he remained there until the 28th. On the 6th of September he was in the Convention. The vote of the state was not taken in the Convention after the retirement of Yates and Lansing.

idea familiar to the people, in the number that had been required under the Confederation upon certain questions of grave importance; and in order that the Constitution might avail itself of this established usage, it was determined that the ratifications of the conventions of *nine* states should be sufficient to establish the Constitution between the states that might so ratify it.<sup>1</sup>

The Constitution, as thus finally prepared, received the formal assent of the states in the Convention, on the last day of the session.<sup>2</sup> The great majority of the members desired that the instrument should go forth to the public, not only with an official attestation that it had been agreed upon by the states represented, but also with the individual sanction and signatures of their delegates. Three of the members present, however, Randolph and Mason of Virginia, and Gerry of Massachusetts, notwithstanding the proposed form of attestation contained no personal approbation of the system, and signified only that it had been agreed to by the unanimous consent of the states then present, refused to sign the instrument.<sup>3</sup> The objections which these gentlemen had to different features of the Constitution would have been waived, if the Convention had been willing to take a course quite opposite to that which had been thought expedient. They desired that the state conventions should be at liberty to propose amendments, and that those amendments should be finally acted upon by another general convention.<sup>4</sup> The nature of the plan, however, and the form in which it was to be submitted to the people of the states, made it necessary that it should be adopted or rejected as a whole, by the convention of each state. As a process of amendment by the action of the Congress and the state legislatures had

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<sup>1</sup> Elliot, V. 499-501. The article embodying this decision was the 21st in the report of the committee of detail. It became, on the revision, Article VIII. of the Constitution.

<sup>2</sup> September 17th.

<sup>3</sup> This form of attestation had been adopted in the hope of gaining the signatures of all the members, but without success.

<sup>4</sup> Mr. Madison has given the principal grounds of objection which these gentlemen felt to the Constitution. It is not necessary to repeat them here, as they were nearly all met by the subsequent amendments, so far as they were special, and did not relate to the general tendency of the system. See Madison, Elliot, V. 552-558.

been provided in the instrument, there was the less necessity for holding a second convention. The state conventions would obviously be at liberty to propose amendments, but not to make them a condition of their acceptance of the government, as proposed.

A letter having been prepared to accompany the Constitution, and to present it to the consideration and action of the existing Congress, the instrument was formally signed by all the other members then present. The official record sent to the Congress of the resolutions which directed that the Constitution be laid before that body, recited the presence of the states of New Hampshire, Massachusetts, Connecticut, New Jersey, Pennsylvania, Delaware, Maryland, Virginia, North Carolina, South Carolina, and Georgia. New York was not regarded as officially present; but in order that the proceedings might have all the weight that a name of so much importance could give to them, in the place that should have been filled by his state was recited the name of "Mr. Hamilton from New York." The prominence thus given to the name of Hamilton, by the absence of his colleagues, was significant of the part he was to act in the great events and discussions that were to attend the ratification of the instrument by the states. His objections to the plan were certainly not less grave and important than those which were entertained by the members who refused to give to it their signatures; but like Madison, like Pinckney and Franklin and Washington, he considered the choice to be between anarchy and convulsion, on the one side, and the chances of good to be expected of this plan, on the other. Upon this issue, in truth, the Constitution went to the people of the United States. There is a tradition that when Washington was about to sign the instrument, he rose from his seat, and, holding the pen in his hand, after a short pause, pronounced these words: "Should the states reject this excellent Constitution, the probability is that an opportunity will never again offer to cancel another in peace—the next will be drawn in blood."<sup>1</sup>

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<sup>1</sup> My authority for this anecdote is the Pennsylvania Journal of November 14th, 1787, where it was stated by a writer who dates his communication from Elizabethtown, November 7th.

## CHAPTER XXXIII.

GENERAL RECEPTION OF THE CONSTITUTION.—HOPES OF A REUNION WITH GREAT BRITAIN.—ACTION OF THE CONGRESS.—STATE OF FEELING IN MASSACHUSETTS, NEW YORK, VIRGINIA, SOUTH CAROLINA, MARYLAND, AND NEW HAMPSHIRE.—APPOINTMENT OF THEIR CONVENTIONS.

THE national Convention was dissolved on the 14th of September. The state of expectation and anxiety throughout the country during its deliberations, and at the moment of its adjournment, will appear from a few leading facts and ideas, which illustrate the condition of the popular mind when the Constitution made its appearance.

The secrecy with which the proceedings of the Convention had been conducted, the nature of its business, and the great eminence and personal influence of its principal members, had combined to create the deepest solicitude in the public mind in all the chief centres of population and intelligence throughout the Union. An assembly of many of the wisest and most distinguished men in America had been engaged for four months in preparing for the United States a new form of government, and the public had acquired no definite knowledge of their transactions, and no information respecting the nature of the system they were likely to propose. Under these circumstances we may expect to find the most singular rumors prevailing during the session of the Convention, and a great excitement in the public mind in many localities, when the result was announced. Among the reports that were more or less believed through the latter part of the summer, was the idle one that the Convention were framing a system of monarchical government, and that "the Bishop of Osnaburg" was to be sent for, to be the sovereign of the new kingdom.

Foolish as it may appear to us, this story occasioned some real alarm in its day. It is to be traced to a favorite idea of that class

of Americans who had either been avowed "Tories" during the Revolution, or had secretly felt a greater sympathy with the mother country than with the land of their birth, and who were at this period generally called "Loyalists." Some of these persons had taken no part, on either side, during the Revolutionary war, and had abstained from active participation in public affairs since the peace. They were all of that class of minds whose tendencies led them to the belief that the materials for a safe and efficient republican government were not to be found in these states, and that the public disorders could be corrected only by a government of a very different character. Their feelings and opinions carried them towards a reconciliation with England, and their grand scheme for this purpose was to invite hither the titular Bishop of Osnaburg.<sup>1</sup>

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<sup>1</sup> It may be amusing to Americans of this and future generations to know who this personage was for whom it was rumored that the Loyalists desired to "send," and whose advent as a possible ruler of this country was a vague apprehension in the popular mind for a good while, and finally came to be imputed as a project to the framers of the Constitution. The Bishop of Osnaburg was no other than the Duke of York, Frederick, the second son of King George III.; a prince whose conduct as commander-in-chief of the army, in consequence of the sale of commissions by his mistress, one Mrs. Clarke, became in 1809 a subject of inquiry, leading to the most scandalous revelations before the House of Commons. The duke was born in 1763, and was consequently, at the period spoken of in the text, at the age of twenty-four. When about a year old (1764), he was chosen Bishop of Osnaburg. This was a German province (Osnabrück), formerly a bishopric of great antiquity, founded by Charlemagne. At the Reformation most of the inhabitants became Lutherans, and by the Treaty of Westphalia it was agreed that it should be governed alternately by a Roman Catholic and a Protestant bishop. In 1802 it was secularized, and assigned as an hereditary principality to George III., in his capacity of King of Hanover. Prince Frederick continued to be called by the title of Bishop of Osnaburg, until he was created Duke of York. I am not aware that the whispers of his name in the secret councils of our Loyalists, as a proposed king for America, became known in England. Whether such knowledge would have excited a smile, or have awakened serious hopes, is a question on which the reader can speculate. But it is certain that there were persons in this country, and in the neighboring British provinces, who had long hoped for a reunion of the American states with the parent country, through this or some other "mad project." Colonel Humphreys (who had been one of Washington's aides), writing to Hamilton, from New Haven, under date of September 16th, 1787, says: "The quondam Tories have undoubtedly conceived hopes of a future union with Great Britain,

Their numbers were not large in any of the states; but the feeling of insecurity and the dread of impending anarchy were shared by others who had no particular inclination towards England; and it is not to be doubted that the Constitution, among the other mischiefs which it averted, saved the country from a desperate attempt to introduce a form of government which must have been crushed beneath commotions that would have made all government, for a long time at least, impracticable. The public anxiety, created by the reports in circulation, had reached such a point in the month of August—when it was rumored that the Convention had recently given a higher tone to the system they were preparing—that members found it necessary to answer nu-

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from the inefficacy of our government, and the tumults which prevailed during the last winter. I saw a letter, written at that period, by a clergyman of considerable reputation in Nova Scotia, to a person of eminence in this state, stating the impossibility of our being happy under our present constitution, and proposing (now we could think and argue calmly on all the consequences), that the efforts of the moderate, the virtuous, and the brave should be exerted to effect a reunion with the parent state. . . . It seems, by a conversation I have had here, that the ultimate practicability of introducing the Bishop of Osnaburg is not a novel idea among those who were formerly termed Loyalists. Ever since the peace it has been occasionally talked of and wished for. Yesterday, where I dined, half jest, half earnest, he was given as the first toast. I leave you now, my dear friend, to reflect how ripe we are for the most mad and ruinous project that can be suggested, especially when, in addition to this view, we take into consideration how thoroughly the patriotic part of the community, the friends of an efficient government, are discouraged with the present system, and irritated at the popular demagogues who are determined to keep themselves in office, at the risk of everything. Thence apprehensions are formed that, though the measures proposed by the Convention may not be equal to the wishes of the most enlightened and virtuous, yet that they will be too high-toned to be adopted by our popular assemblies. Should that happen, our political ship will be left afloat on a sea of chance, without a rudder as well as without a pilot." (Works of Hamilton, I. 443.) In a grave and comprehensive private memorandum, drawn up by Hamilton soon after the Constitution appeared, in which he summed up the probabilities for and against its adoption, and the consequences of its rejection, the following occurs, as among the events likely to follow such rejection: "A reunion with Great Britain, from universal disgust at a state of commotion, is not impossible, though not much to be feared. The most plausible shape of such a business would be the establishment of a son of the present monarch in the supreme government of this country, with a family compact." (Works, II. 419, 421.)

merous letters of inquiry from persons who had become honestly alarmed. "Though we cannot affirmatively tell you," was their answer, "what we are doing, we can negatively tell you what we are *not* doing—we never once thought of a king."<sup>1</sup>

All doubt and uncertainty were dispelled, however, by the publication of the Constitution in the newspapers of Philadelphia, on the 19th of September. It was at once copied into the principal journals of all the states, and was perhaps as much read by the people at large as any document could have been in the condition of the means of public intelligence which a very imperfect post-office department then afforded. It met everywhere with warm friends and warm opponents; its friends and its opponents being composed of various classes of men, found, in different proportions, in almost all of the states. Those who became its advocates were, first, a large body of men, who recognized, or thought they recognized, in it the admirable system which it in fact proved to be when put into operation; secondly, those who, like most of the statesmen who made it, believed it to be the best attainable government that could be adopted by the people of the United States, overlooking defects which they acknowledged, or trusting to the power of amendment which it contained; and, thirdly, the mercantile and manufacturing classes, who regarded its commercial and revenue powers with great favor. Its adversaries were those who had always opposed any enlargement of the federal system; those whose consequence as politicians would be diminished by the establishment of a government able to attract into its service the highest classes of talent and character, and presenting a service distinct from that of the states; those who conscientiously believed its provisions and powers dangerous to the rights of the states and to public liberty; and, finally, those who were opposed to any government, whether state or national or federal, that would have vigor and energy enough to protect the rights of property, to prevent schemes of plunder in the form of paper money, and to bring about the discharge of public and private debts. The different opponents of the Constitution being animated by these various motives, great care should be taken by posterity, in estimating the conduct of individuals, not to con-

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<sup>1</sup> Pennsylvania Journal, August 22d, 1787.

found these classes with each other, although they were often united in action.

As the Constitution presented itself to the people in the light of a proposal to enlarge and reconstruct the system of the federal Union, its advocates became known as the "Federalists," and its adversaries as the "Anti-Federalists." This celebrated designation of Federalist, which afterwards became so renowned in our political history as the name of a party, signified at first nothing more than was implied in the title of the essays which passed under that name, namely, an advocacy of the Constitution of the United States.<sup>1</sup>

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<sup>1</sup> The history of the term "Federal," or "Federalist," offers a curious illustration of the capricious changes of sense which political designations often undergo, within a short period of time, according to the accidental circumstances which give them their application. During the discussions of the Convention which framed the Constitution of the United States, the term *federal* was employed in its truly philosophic sense, to designate the nature of the government established by the Articles of Confederation, in distinction from a national system, that would be formed by the introduction of the plan of having the states represented in the Congress in proportion to the numbers of their inhabitants. But when the Constitution was before the people of the states for their adoption, its friends and advocates were popularly called Federalists, because they favored an enlargement of the federal government at the expense of some part of the state sovereignties, and its opponents were called Anti-Federalists. In this use the former term in no way characterized the nature of the system advocated, but merely designated a supporter of the Constitution. A few years later, when the first parties were formed, in the first term of Washington's administration, it so happened that the leading men who gave a distinct character to the development which the Constitution then received had been prominent advocates of its adoption, and had been known, therefore, as Federalists, as had also been the case with some of those who separated themselves from this body of persons and formed what was termed the Republican, afterwards the Democratic party. But the prominent supporters of the policy which originated in Washington's administration continued to be called Federalists, and the term thus came to denote a particular school of politics under the Constitution, although it previously signified merely an advocacy of its adoption. Thus, for example, Hamilton, in 1787, was no Federalist, because he was opposed to the continuance of a federal, and desired the establishment of a national government. In 1788 he was a Federalist, because he wished the Constitution to be adopted; and he afterwards continued to be a Federalist, because he favored a particular policy in the administration of the government, under the Constitution. It was in this latter sense that the term became so celebrated in our political history. The reader will



Midway between the active friends and opponents of the Constitution lay that great and somewhat inert mass of the people, which, in all free countries, finally decides by its preponderance every seemingly doubtful question of political changes. It was composed of those who had no settled convictions or favorite theories respecting the best form of a general government, and who were under the influence of no other motive than a desire for some system that would relieve their industry from the oppressions under which it had long labored, and would give security, peace, and dignity to their country. Ardently attached to the principles of republican government and to their traditionary maxims of public liberty, and generally feeling that their respective states were the safest depositories of those principles and maxims, this portion of the people of the United States were likely to be much influenced by the arguments against the Constitution founded on its want of what was called a Bill of Rights, on its omission to secure a trial by jury in civil cases, and on the other alleged defects which were afterwards corrected by the first ten amendments. But they had great confidence in the principal framers of the instrument, an unbounded reverence for Washington and Franklin, and a willingness to try any experiment sanctioned by men so illustrious and so entirely incapable of any selfish or unworthy purpose.<sup>1</sup> There were, however, considerable numbers of the people, in the more remote districts of several of the states, who had a very imperfect acquaintance, if they had any, with the details of the proposed system, at the time when their legislatures were called upon to provide for the assembling of conventions; for we are not to suppose that what would now be the general and almost instantaneous knowledge of any great political event or topic could have taken place at that day concerning the proposed Constitution of the United States. Still it was quite generally understood before its final ratification in the states where its

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observe that I use it, in this part of my work, only in the sense attached to it while the Constitution was before the people of the states for adoption.

<sup>1</sup> A striking proof of the importance attached by the people to the opinions of Washington and Franklin may be found in a controversy carried on for a short time in the newspapers of Philadelphia and New York, after the Constitution appeared, whether those distinguished persons *really approved* what they had signed.

adoption was postponed to the following year, where information was most wanted, and where the chief struggles occurred ; and it is doubtless correct to assert that its adoption was the intelligent choice of a majority of the people of each state, as well as the choice of their delegates, when their conventions successively acted upon it.

On the adjournment of the Convention, Madison, King, and Gorham, who held seats in the Congress of the Confederation, hastened to the city of New York, where that body was then sitting. They found eleven states represented.<sup>1</sup> But they found also that an effort was likely to be made, either to arrest the Constitution on its way to the people of the states, or to subject it to alteration before it should be sent to the legislatures. It was received by official communication from the Convention in about ten days after that assembly was dissolved. All that was asked of the Congress was that they should transmit it to their constituent legislatures for their action. The old objection, that the Congress could with propriety participate in no measure designed to change the form of a government which they were appointed to administer, having been answered, Richard Henry Lee of Virginia proposed to amend the instrument by inserting a Bill of Rights, trial by jury in civil cases, and other provisions in conformity with the objections which had been made in the Convention by Mr. Mason.

To the address and skill of Mr. Madison, I think, the defeat of this attempt must be attributed. If it had succeeded the Constitution could never have been adopted by the necessary number of states ; for the recommendation of the Convention did not make the action of the state legislatures conditional upon their receiving the instrument from the Congress ; the legislatures would have been at liberty to send the document published by the Convention to the assemblies of delegates of the people, without adding provisions that might have been added by the Congress ; some of them would have done so, while others would have followed the action of the Congress, and thus there would have been in fact two Constitutions before the people of the states, and their acts of ratification would have related to dissimilar instruments.

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<sup>1</sup> All but Maryland and Rhode Island.

This consideration induced the Congress, by a unanimous vote of the states present, to adopt a resolution which, while it contained no approval of the Constitution, abstained from interfering with it as it came from the Convention, and transmitted it to the state legislatures, "in order to be submitted to a convention of delegates chosen in each state by the people thereof, in conformity to the resolves of the Convention made and provided in that case."<sup>1</sup>

In Massachusetts the Constitution was well received, on its first publication, so far as its friends in the central portion of the Union could ascertain. Mr. Gerry was a good deal censured for refusing to sign it, and the public voice, in Boston and its neighborhood, appeared to be strongly in its favor. But in a very short time three parties were formed among the people of the state, in such proportions as to make the result quite uncertain. The commercial classes, the men of property, the clergy, the members of the legal profession, including the judges, the officers of the late army, and most of the people of the large towns, were decidedly in favor of the Constitution. This party amounted to three sevenths of the people of the state. The inhabitants of the district of Maine, who were then looking forward to the formation of a new state, would be likely to vote for the new Constitution, or to oppose it, as they believed it would facilitate or retard their wishes; and this party numbered two sevenths. The third party consisted of those who had been concerned in the late insurrection under Shays, and their abettors; the majority of them desiring the annihilation of debts, public and private, and believing that the proposed Constitution would strengthen all the rights of property. Their numbers were estimated at two sevenths of the people.<sup>2</sup> It was evident that a union of the first two parties would secure the ratification of the instrument, and a union of the last two would defeat it. Great caution, conciliation, and good temper were, therefore, required, on the part of its friends. The influence of Massachusetts on Virginia, on New York, and indeed on all the states that were likely to act after her, would be of the utmost importance. The state convention was ordered to assemble in January.

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<sup>1</sup> Passed September 28th, 1787. Journals, XII. 149-166.

<sup>2</sup> This is the substance of a careful account given by General Knox to Washington. Works of Washington, IX. 310, 311.

In New York, as elsewhere, the first impressions were in favor of the Constitution. In the city, and in the southern counties generally, it was from the first highly popular. But it was soon apparent that the whole official influence of the executive government of the state would be thrown against it. There had been a strong party in the state, ever since its refusal to bestow on the Congress the powers asked for in the revenue system of 1783, who had regarded the Union with jealousy, and steadily opposed the surrender to it of any further powers. Of this party the governor, George Clinton, was now the head; and the government of the state, which embraced a considerable amount of what is termed "patronage," was in their hands. Two of the delegates of the state to the national Convention, Yates and Lansing, had retired from that body before the Constitution was completed, and had announced their opposition to it in a letter to the governor, which, from its tone and the character of its objections, was likely to produce a strong impression on the public mind. It became evident that the Constitution could be carried in the state of New York in no other way than by a thorough discussion of its merits—such a discussion as would cause it to be understood by the people, and would convince them that its adoption was demanded by their interests. For this purpose Hamilton, Madison, and Jay, under the common signature of Publius, commenced the publication of the series of essays which became known as *The Federalist*. The first number was issued in the latter part of October.

In January the governor presented the official communication of the instrument from the Congress to the legislature, with the cold remark that, from the nature of his official position, it would be improper for him to have any other agency in the business than that of laying the papers before them for their information. Neither he nor his party, however, contented themselves with this abstinence. After a severe struggle, resolutions ordering a state convention to be elected were passed by the bare majorities of three in the Senate and two in the House, on the first day of February, 1788. The elections were held in April; and when the result became known, in the latter part of May, it appeared that the Anti-Federalists had elected two thirds of the members of the Convention, and that probably four sevenths of the people of the

state were unfriendly to the Constitution. Backed by this large majority, the leaders of the Anti-Federal party intended to meet in convention at the appointed time, in June, and then to adjourn until the spring or summer of 1789. Their argument for this course was that if the Constitution had been adopted in the course of a twelvemonth by nine other states, New York would have an opportunity to witness its operation and to act according to circumstances. They would thus avoid an immediate rejection—a step which might lead the Federalists to seek a separation of the southern from the northern part of the state, for the purpose of forming a new state. On the other hand, the Federalists rested their hopes upon what they could do to enlighten the public at large, and upon the effect on their opponents of the action of other states, especially of Virginia, whose convention was to meet at nearly the same time. The Convention of New York assembled at Poughkeepsie,<sup>1</sup> on the 17th of June, 1788.

However strong the opposition in other states, it was to be in Virginia far more formidable, from the abilities and influence of its leaders, from the nature of their objections, and from the peculiar character of the state. Possessed of a large number of men justly entitled to be regarded then and always as statesmen, although many of them were prone to great refinements in matters of government; filled with the spirit of republican freedom, although its polity and manners were marked by several aristocratic features; having, on the one hand, but few among its citizens interested in commerce, and still fewer, on the other hand, of those levelling and licentious classes which elsewhere sought to overturn or control the interests of property; ever ready to lead in what it regarded as patriotic and demanded by the interests of the Union, but jealous of its own dignity and of the rights of its sovereignty—the state of Virginia would certainly subject the Constitution to as severe an ordeal as it could undergo anywhere, and would elicit in the discussion all the good or the evil that could be discovered in the examination of a system before it had been practically tried. The state was to feel, it is true, the almost overshadowing influence of Washington, in favor of the new

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<sup>1</sup> A town on the Hudson River, seventy-five miles north of the city of New York.

system, exerted, not by personal participation in its proceedings, but in a manner which could leave no doubt respecting his opinion. But it was also to feel the strenuous opposition of Patrick Henry, that great natural orator of the Revolution, whose influence over popular assemblies was enormous, and who added acuteness, subtilty, and logic to the fierce sincerity of his unstudied harangues, and the not less strenuous or effective opposition of George Mason, who had little of the eloquence and passion of his renowned compatriot, but who was one of the most profound and able of all the American statesmen opposed to the Constitution, while he was inferior in general powers and resources to not more than two or three of those who framed or advocated it. Richard Henry Lee, William Grayson, Benjamin Harrison, John Tyler, and others of less note, were united with Henry and Mason in opposing the Constitution. Its leading advocates were to be Madison, Marshall, the future chief-justice of the United States, George Nicholas, and the chancellor, Pendleton. The governor, Edmund Randolph, occupied for a time a middle position between its friends and its opponents, but finally gave to it his support, from motives which I have elsewhere described as eminently honorable and patriotic.

One of the most distinguished of the public men of Virginia had been absent in the diplomatic service of the country for three years. His eminent abilities and public services, his national reputation, and the influence of his name, naturally made both parties anxious to claim the authority of Jefferson, and he was at once furnished with a copy of the Constitution as soon as it appeared. In the heats of subsequent political conflicts he has been often charged by his opponents with a general hostility to the Constitution. The truth is, that Mr. Jefferson's opinions on the subject of government, and of what was desirable and expedient to be done in this country, united with the effect of his long absence from home,<sup>1</sup> did lead him, at first, to think and to say that the Constitution had defects which, if not corrected, would destroy the liberties of America. He was by far the most democratic, in the tendency of his opinions, of all the principal American statesmen

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<sup>1</sup> He went abroad in the summer of 1784.

of that age. He was, according to his own avowal, no friend to an energetic government anywhere. He carried abroad the opinion that the Confederation could be adapted, with a few changes, to all the wants of the Union; and this opinion he continued to retain, because the events which had taken place here during his absence did not produce upon his mind the effect which they produced upon the great majority of public men who remained in the midst of them. He freely declared to more than one of his correspondents in Virginia, at this time, that such disorders as had been witnessed in Massachusetts were necessary to public liberty, and that the national Convention had been too much influenced by them in preparing the Constitution. He held that the natural progress of things is for liberty to lose and for government to gain ground; and that no government should be organized without those express and positive restraints which will jealously guard the liberties of the people, even if those liberties should periodically break into licentiousness. One of his favorite maxims of government was "rotation in office;" and he thought the government of the Union should have cognizance only of matters involved in the relations of the people of each state to foreign countries, or to the people of the other states, and that each state should retain the exclusive control of all its internal and domestic concerns, and especially the power of direct taxation.

Hence it is not surprising that, when Mr. Jefferson received at Paris, early in November, a copy of the Constitution, and when he found in it no express declarations insuring the freedom of religion, freedom of the press, and freedom of the person under the uninterrupted protection of the *habeas corpus*, and no trial by jury in civil cases, and found also that the president would be re-eligible, and that the government would have the power of direct taxation, his anxiety should have been excited. It is a mistake, however, to suppose that he counselled a direct rejection of the instrument by the people of Virginia. His first suggestion was that the nine states which should first act upon it should adopt it unconditionally, and that the four remaining states should accept it only on the previous condition that certain amendments should be made. This plan of his became known in Virginia in the course of the winter of 1787-88, and it gave the Anti-Federalists what they considered a warrant for using his authority on their side. But before

the following spring, when he had had an opportunity to see the course pursued by Massachusetts, he changed his opinion, and authorized his friends to say that he regarded an unconditional acceptance by each state, and subsequent amendments, in the mode provided by the Constitution, as the only rational plan.<sup>1</sup> He also abandoned the opinion that the general government ought not to have the power of direct taxation; but he never receded from his objections founded on the want of a bill of rights, and of trial by jury, and on the re-eligibility of the president.

Immediately after his return to Mount Vernon from the national Convention, Washington sent copies of the Constitution to Patrick Henry, Mason, Harrison, and other leading persons whose opposition he anticipated, with a temperate but firm expression of his own opinion. The replies of these gentlemen furnished him with the grounds of their objections, and at the same time relieved him, as to all of them but Henry, from the apprehension that they might resist the calling of a state convention. Mason and Henry were both members of the legislature. The former was expressly instructed by his constituents of Alexandria county<sup>2</sup> to vote for a submission of the Constitution to the people of the state in convention—a vote which he would probably have given without instruction, as he declared to Washington that he should use all his influence for this purpose. Mr. Henry was not instructed, and the friends of the Constitution expected his resistance. The legislature assembled in October, and on the first day of the session, in a very full House, Henry declared, to the surprise of everybody, that the proposed Constitution must go to

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<sup>1</sup> Compare Mr. Jefferson's autobiography, and his correspondence, in the first, second, and third volumes of his collected works (edition of 1853), and the letters of Mr. Madison.

<sup>2</sup> In the newspapers of the time there is to be found a story that Mr. Mason was very roughly received on his arrival at the city of Alexandria, after the adjournment of the national Convention, on account of his refusal to sign the Constitution. The occurrence is not alluded to in Washington's correspondence, although he closely observed Mr. Mason's movements, and regarded them with evident anxiety. The story is told in the *Pennsylvania Journal* of October 17th, 1787—a strong Federal paper. I know of no other confirmation of it than the fact that the people of Alexandria embraced the Constitution from the first with "enthusiastic warmth," according to the account given by Washington to one of his correspondents. Works, IX. 272.



a popular convention. The elections for such a body were ordered to be held in March and April of the following spring. When they came on, the news that the convention of New Hampshire had postponed their action was employed by the Anti-Federalists, who insisted that this step had been taken in deference to Virginia; although it was in fact taken merely in order that the delegates of New Hampshire might get their previous instructions against the Constitution removed by their constituents. The pride of Virginia was touched by this electioneering expedient, and the result was that the parties in the state convention were nearly balanced, the Federalists, however, having, as they supposed, a majority.<sup>1</sup> The convention was to assemble on the 2d of June, 1788.

In the legislature of South Carolina the Constitution was debated, with great earnestness, for three days, before it was decided to send it to a popular convention. This was owing to the great persistency of Rawlins Lowndes, who carried on the discussion in opposition to the Constitution almost single-handed and with great ability, against the two Pinckneys, Pierce Butler, John and Edward Rutledge, John Julius Pringle, Robert Barnwell, Dr. David Ramsay, and many other gentlemen. At length, on the 19th of January, a resolution was passed, directing a convention of the people to assemble on the 12th of May. The debate in the legislature had tended to diffuse information respecting the system, but it had also produced a formidable minority throughout the state. Mr. Lowndes had employed, with a good deal of skill, the local arguments which would be most likely to form the objections of a citizen of South Carolina. He inveighed against the regulation of commerce, the power over the slave-trade that was to belong to Congress at the end of twenty years, and the preponderance which he contended would be given to the Eastern States by the system of representation in Congress; and although he was ably answered on all points, the effect of the discussion was such that a large minority was returned to the Convention having a strong hostility to the proposed system.<sup>2</sup>

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<sup>1</sup> Washington's Works, IX. 266, 267, 273, 340-342, 345, 346.

<sup>2</sup> This debate of three days in the South Carolina legislature was one of the most able of all the discussions attending the ratification of the Constitution. Mr. Lowndes was overmatched by his antagonists, but he resisted with great spirit, and finally closed with the declaration that he saw dangers in the pro-

The legislature of Maryland assembled in December, and directed the delegates who had represented the state in the national Convention to attend and give an account of the proceedings of that assembly. It was in compliance with this direction that Luther Martin laid before the legislature that celebrated communication which embodied not only a very clear statement of the mode in which the principal compromises of the Constitution were framed, as seen from the point of view occupied by one who resisted them at every step, but also an exceedingly able argument against the fundamental principle of the proposed government. It was a paper, too, marked throughout with an earnestness almost amounting to fanaticism. Repelling, with natural indignation and dignity, the imputation that he was influenced by a state office which he then held, he referred to the numerous honors and emoluments which the Constitution of the United States would create, and suggested—what his abilities and reputation well justified—that his chance of obtaining a share of them was as good as most men's. "But this," was his solemn conclusion, "I can say with truth, that so far was I from being influenced in my conduct by interest, or the consideration of office, that I would cheerfully resign the appointment I now hold; I would bind myself never to accept another, either under the general government or that of my own state; I would do more, sir—so destructive do I consider the present system to the happiness of my country—I would cheerfully sacrifice that share of property with which Heaven has blessed a life of industry; I would reduce myself to indigence and poverty; and those who are dearer to me than my own existence I would intrust to the care and protection of that Providence who hath so kindly protected myself, if on *those terms only* I could procure my country to reject those chains which are forged for it."

Such a strength of conviction as this, on the part of a man of high talent, was well calculated to produce an effect. No document that appeared anywhere, against the Constitution, was better

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posed government so great that he could wish, when dead, for no other epitaph than this: "Here lies the man that opposed the Constitution, because it was ruinous to the liberty of America." He lived to find his desired epitaph a false prophecy. He was the father of the late William Lowndes, who represented the state of South Carolina in Congress, with so much honor and distinction, during the administration of Mr. Madison.

adapted to rouse the jealousy, to confirm the doubts, or to decide the opinions of a certain class of minds. But it was an argument which reduced the whole question substantially to the issue whether the principle of the Union could safely be changed from that of a federal league, with an equality of representation and power as between the states, to a system of national representation in a legislative body having cognizance of certain national interests, in one branch of which the people inhabiting the respective states should have power in proportion to their numbers.<sup>1</sup> This was a question on which men would naturally and honestly differ; but it was a question which a majority of reflecting men, in almost every state, were likely, after due inquiry, to decide against the views of Mr. Martin, because it was clear that the Confederation had failed, and had failed chiefly by reason of the peculiar and characteristic nature of its representative system, and because the representative system proposed in the Constitution was the only one that could be agreed upon as the alternative. Mr. Martin's objections, however, like those of other distinguished men who took the same side in other states, were of a nature to form the creed of an earnest, conscientious, and active minority. They had this effect in the state of Maryland. The legislature ordered a state convention to consider the proposed Constitution, and directed it to meet on the 21st of April, 1788.

The convention of New Hampshire was to assemble in February. A large portion of the state lay remote from the channels of intelligence, and a considerable part of the people in the interior had not seen the Constitution, when they were called upon to elect their delegates. The population, outside of two or three principal places, was a rural one, thinly scattered over townships of large territorial extent, lying among the hills of a broken and rugged country, extending northerly from the narrow strip of sea-coast towards the frontier of Canada. It was easy for the opposition to persuade such a people that a scheme of government had been prepared which they ought to reject; and the consequence of their efforts was that the state convention assembled, probably with a

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<sup>1</sup> Mr. Martin's objections extended to many of the details of the Constitution, but his great argument was that directed against its system of representation, which he predicted would destroy the state governments.

majority, certainly with a strong minority, of its members bound by positive instructions to vote against the Constitution which they were to consider.

I have thus, in anticipation of the strict order of events, given a general account of the position of this great question in six of the states, down to the time of the meeting of their respective conventions, because when the session of the convention of Massachusetts commenced, in January, 1788, the people of the five states of Delaware, Pennsylvania, New Jersey, Georgia, and Connecticut had successively ratified the Constitution without proposing any amendments, and because the action of the others, extending through the six following months, embraced the real crisis to which the Constitution was subjected, and developed what were thereafter to be considered as its important defects, according to the view of a majority of the states, and probably also of a majority of the people of all the states. For although the people of Delaware, Pennsylvania, New Jersey, Georgia, and Connecticut ratified the Constitution without insisting on previous or subsequent amendments, it is certain that some of the same topics were the causes of anxiety and objection in those states, which occasioned so much difficulty, and became the grounds of special action, in the remaining states.

In coming, however, to the more particular description of the resistance which the Constitution encountered, it will be necessary to discriminate between the opposition that was made to the general plan of the government, or to the particular features of it which it was proposed to create, and that which was founded on its omission to provide for certain things that were deemed essential. Of what may be called the positive objections to the Constitution, it may be said, in general, that, however fruitful of debate or declamation, or serious and important doubt, might be the question whether such a government as had been framed by the national Convention should be substituted for the Confederation, the opposition were not confined to this question, as the means of persuading the people that the proposed system ought to be rejected. One of the most deeply interested of the men who were watching the currents of public opinion with extreme solicitude observed "a strong belief in the people at large of the insufficiency of the Confederation to preserve the existence of the Union, and

of the necessity of the Union to their safety and prosperity ; of course, a strong desire of a change, and a predisposition to receive well the propositions of the Convention.”<sup>1</sup> But while the Constitution came before the people with this conviction and this predisposition in its favor, yet when its opponents, in addition to their positive objections to what it did contain, could point to what it did *not* embrace, and could say that it proposed to establish a government of great power, without providing for rights of primary importance, and without any declaration of the cardinal maxims of liberty which the people had from the first been accustomed to incorporate with their state constitutions ; and while the local interests, the sectional feelings, and the separate policy, real or supposed, of different states furnished such a variety of means for defeating its adoption by the necessary number of nine states, we may not wonder that its friends should have been doubtful of the issue. “It is almost arrogance,” said the same anxious observer, “in so complicated a subject, depending so entirely upon the incalculable fluctuations of the human passions, to attempt even a conjecture about the result.”<sup>2</sup>

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<sup>1</sup> Hamilton, Works, II. 419, 420.

<sup>2</sup> Ibid., 421.

## CHAPTER XXXIV.

RATIFICATIONS OF DELAWARE, PENNSYLVANIA, NEW JERSEY, GEORGIA, AND CONNECTICUT, WITHOUT OBJECTION.—CLOSE OF THE YEAR 1787.—BEGINNING OF THE YEAR 1788.—RATIFICATION OF MASSACHUSETTS, THE SIXTH STATE, WITH PROPOSITIONS OF AMENDMENT.—RATIFICATION OF MARYLAND, WITHOUT OBJECTION.—SOUTH CAROLINA, THE EIGHTH STATE, ADOPTS, AND PROPOSES AMENDMENTS.

THE first state that ratified the Constitution, although its convention was not the first to assemble, was Delaware. It was a small, compact community, with the northerly portion of its territory lying near the city of Philadelphia, with which its people had constant and extensive intercourse. Its public men were intelligent and patriotic. In the national Convention it had contended with great spirit for the interests of the smaller states, and its people now had the sagacity and good sense to perceive that they had gained every reasonable security for their peculiar rights. The public press of Philadelphia friendly to the Constitution furnished the means of understanding its merits, and the discussions in the convention of Pennsylvania, which assembled before that of Delaware, threw a flood of light over the whole subject, which the people of Delaware did not fail to regard. Their delegates unanimously ratified and adopted the Constitution on the 7th of December.

The convention of Pennsylvania met, before that of any of the other states, at Philadelphia, on the 20th of November. It was the second state in the Union in population. Its chief city was perhaps the first in the Union in refinement and wealth, and had often been the scene of great political events of the utmost interest and importance to the whole country. There had sat, eleven years before, that illustrious Congress of deputies from the thirteen colonies, who had declared the independence of America, had made Washington commander-in-chief of her armies, and had

given her struggle for freedom a name throughout the world. There the Revolutionary Congress had continued, with a short interruption, to direct the operations of the war. There the alliance with France was ratified, in 1778. There the Articles of Confederation were finally carried into full effect, in 1781. There, within six months afterwards, the Congress received intelligence of the surrender of Cornwallis, and walked in procession to one of the churches of the city, to return thanks to God for a victory which in effect terminated the war. There the instructions for the treaty of peace were given, in 1782, and there the Constitution of the United States had been recently framed. For more than thirteen years, since the commencement of the Revolution, and with only occasional intervals, the people of Philadelphia had been accustomed to the presence of the most eminent statesmen of the country, and had learned, through the influences which had gone forth from their city, to embrace in their contemplation the interests of the Union.

They placed in the state convention, that was to consider the proposed Constitution of the United States, one of the wisest and ablest of its framers—James Wilson. The modesty of his subsequent career, and the comparatively little attention that has been bestowed by succeeding generations upon the personal exertions that were made in framing and establishing the Constitution, must be regarded as the causes that have made his reputation, at this day, less extensive and general than his abilities and usefulness might have led his contemporaries to expect that it would be. Yet the services which he rendered to the country, first in assisting in the preparation of the Constitution, and afterwards in securing its adoption by the state of Pennsylvania, should place his name high upon the list of its benefactors. He had not the political genius which gave Hamilton such a complete mastery over the most complex subjects of government, and which enabled him, when the Constitution had been adopted, to give it a development in practice that made it even more successful than its theory alone could have allowed any one to regard as probable; nor had he the talent of Madison for debate and for constitutional analysis; but in the comprehensiveness of his views, and in his perception of the necessities of the country, he was not their inferior, and he was throughout one of their most efficient and best-informed coadjutors.

He had to encounter, in the convention of the state, a body of men a majority of whom were not unfriendly to the Constitution, but among whom there was a minority very hard to be conciliated. In the counties which lay west of the Susquehanna—the same region which afterwards, in Washington's administration, became the scene of an insurrection against the authority of the general government—there was a rancorous, active, and determined opposition. Mr. Wilson, being the only member of the state convention who had taken part in the framing of the Constitution, was obliged to take the lead in explaining and defending it. His qualifications for this task were ample. He had been a very important and useful member of the national Convention; he had read every publication of importance, on both sides of the question, that had appeared since the Constitution was published, and his legal and historical knowledge was extensive and accurate. No man succeeded better than he did, in his arguments on that occasion, in combating the theory that a state government possessed the whole political sovereignty of the people of the state. However true it might be, he said, in England, that the Parliament possesses supreme and absolute power, and can make the constitution what it pleases, in America it has been incontrovertible since the Revolution that the supreme, absolute, and uncontrollable power is in the people before they make a constitution, and remains in them after it is made. To control the power and conduct of the legislature by an overruling constitution was an improvement in the science and practice of government reserved to the American states; and at the foundation of this practice lies the right to change the constitution at pleasure—a right which no positive institution can ever take from the people. When they have made a state constitution they have bestowed on the government created by it a certain portion of their power; but the fee simple of their power remains in themselves.

Mr. Wilson was equally clear in accounting for the omission to insert a bill of rights in the Constitution of the United States. In a government, he observed, consisting of enumerated powers, such as was then proposed for the United States, a bill of rights, which is an enumeration of the powers reserved by the people, must either be a perfect or an imperfect statement of the powers and privileges reserved. To undertake a perfect enumeration of



the civil rights of mankind is to undertake a very difficult and hazardous, and perhaps an impossible task ; yet if the enumeration is imperfect, all implied power seems to be thrown into the hands of the government, on subjects in reference to which the authority of government is not expressly restrained, and the rights of the people are rendered less secure than they are under the silent operation of the maxim that every power not expressly granted remains in the people. This, he stated, was the view taken by a large majority of the national Convention, in which no direct proposition was ever made, according to his recollection, for the insertion of a bill of rights.<sup>1</sup> There is, undoubtedly, a general truth in this argument, but, like many general truths in the construction of governments, it may be open to exceptions when applied to particular subjects or interests. It appears to have been, for the time, successful ; probably because the opponents of the Constitution, with whom Mr. Wilson was contending, did not bring forward specific propositions for the declaration of those particular rights which were made the subjects of special action in other state conventions.

Besides a very thorough discussion of these great subjects, Mr. Wilson entered into an elaborate examination and defence of the whole system proposed in the Constitution. He was most ably seconded in his efforts by Thomas McKean, then chief-justice of Pennsylvania and afterwards its governor, the greater part of whose public life had been passed in the service of Delaware, his native state, and who had always been a strenuous advocate of the interests of the smaller states, but who found himself satisfied with the provision for them made by the Constitution for the construction of the Senate of the United States.\* “I have gone,” said he, “through the circle of office in the legislative, executive, and judicial departments of government ; and from all my study, observation, and experience, I must declare

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<sup>1</sup> This was a mistake. On the 12th of September, Messrs. Gerry and Mason moved for a committee to prepare a bill of rights, but the motion was lost by an equal division of the states. Elliot, V. 538.

\* Mr. McKean, although his residence was at Philadelphia, represented the lower counties of Delaware in Congress from 1774 to 1783. In 1777 he was made chief-justice of Pennsylvania, being at the same time a member of Congress and president of the state of Delaware.

that, from a full examination and due consideration of this system, it appears to me the best the world has yet seen. I congratulate you on the fair prospect of its being adopted, and am happy in the expectation of seeing accomplished what has long been my ardent wish, that you will hereafter have a salutary permanency in magistracy and stability in the laws."

The result of the discussion in the convention of Pennsylvania was the ratification of the Constitution. The official ratification sent to Congress was signed by a very large majority of the delegates, and contains no notice of any dissent.<sup>1</sup> But the representatives of that portion of the state which lay west of the Susquehanna generally refused their assent, and their district afterwards became the place in which the proposition was considered whether the government should be allowed to be organized.<sup>2</sup>

The convention of New Jersey was in session at the time of the ratification by Pennsylvania. Mr. Madison had passed through the state in the autumn, on his way to the Congress, then sitting in the city of New York, and could discover no evidence of serious opposition to the Constitution. Lying between the states of New York and Pennsylvania, New Jersey was closely watched by the friends and the opponents of the Constitution in both of those states, and was likely to be much influenced by the predominating sentiment in the one that should first act.<sup>3</sup> But the people of New

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<sup>1</sup> The Constitution was ratified by a vote of 46 to 23.

<sup>2</sup> This was at a meeting held at Harrisburg, September 3d, 1788.

<sup>3</sup> The opposite parties in Pennsylvania were so much excited against each other, and the course of New Jersey was viewed with so much interest at Philadelphia among the "Federalists," that a story found currency and belief there to the effect that Clinton, the governor of New York, had offered the state of New Jersey, through one of its influential citizens, one half of the impost revenue of New York if she would reject the Constitution. The preposterous character of such a proposition stamps the rumor with gross improbability. But its circulation evinces the anxiety with which the course of New Jersey was regarded in the neighboring states, and it is certain that the opposition in New York made great efforts to influence it.

While these pages are passing through the press, I have had the honor of receiving from the Historical Society of Pennsylvania a presentation copy of a book lately published by them, entitled "Pennsylvania and the Federal Constitution, 1787-1788; edited by John Bach McMaster and Frederick D. Stone." I desire here to make my acknowledgments for the courtesy of these gentlemen,

Jersey had, in truth, fairly considered the whole matter, and had found what their own interests required. They alone, of all the states, when the national Convention was instituted, had expressly declared that the regulation of commerce ought to be vested in the general government. They had learned that to submit longer to the diverse commercial and revenue systems in force in New York on the one side of them, and in Pennsylvania on the other side, would be like remaining between the upper and the nether millstone. Their delegates in the national Convention had, it is true, acted with those of New York, in the long contest concerning the representative system, resisting at every step each departure from the principle of the Confederation, until the compromise was made which admitted the states to an equal representation in the Senate. Content with the security which this arrangement afforded, the people of New Jersey had the sagacity to perceive that their interests were no longer likely to be promoted by following in the lead of the Anti-Federalists of New York. Their delegates unanimously ratified the Constitution on the 12th of December, five days after the ratification of Pennsylvania.

A few days later there came from the far South news that the convention of Georgia had, with like unanimity, adopted the Constitution. Neither the people of the state, nor their delegates, could well have acted under the influence of what was taking place in the centre of the Union. Their situation was too remote for the reception, at that day, within the same fortnight, of the news of events that had occurred in Pennsylvania and New Jersey, and they could scarcely have read the great discussions that were going on in various forms of controversy in the cities of New York and Philadelphia, and throughout the Middle and the Eastern States. Wasted excessively during the Revolution, by the nature of the warfare carried on within her limits; left at the peace to contend with a large, powerful, and cruel tribe of Indians that pressed upon her western settlements; and having her southern

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and to express my sense of the value of their labors. This book gives an account of the contest in Pennsylvania over the new Constitution, and many instructive as well as amusing details of the conduct of the parties favoring and opposing it. It also contains biographical sketches of the men who represented Pennsylvania in her ratifying convention, and is ornamented with fine portraits of fifteen of the most prominent of them.

frontier bordering upon the unfriendly territory of a Spanish colony, the state of Georgia had strong motives to lead her to embrace the Constitution of the United States, and found little in that instrument calculated to draw her in the opposite direction. Her delegates had resisted the surrender of control over the slave-trade, but they had acquiesced in the compromise on that subject, and there was in truth nothing in the position in which it was left that was likely to give the state serious dissatisfaction or uneasiness. The people of Georgia had something more important to do than to quarrel with their representatives about the principles or details of the system to which they had consented in the national Convention. They felt the want of a general government able to resist, with a stronger hand than that of the Confederation, the evils which pressed upon them.<sup>1</sup> Their assent was unanimously given to the Constitution on the 2d of January, 1788.

The legislature of Connecticut had ordered a convention to be held on the 4th of January. When the elections were over it was ascertained that there was a large majority in favor of the Constitution; but there was to be some opposition, proceeding principally from that portion of the people who resisted whatever tended to the vigor and stability of government, a spirit that existed to some extent in all the New England States. When the convention of the state assembled, the principal duty of advocating the adoption of the Constitution devolved on Oliver Ellsworth, who had borne an active and distinguished part in its preparation. He found that the topic which formed the chief subject of all the arguments against the Constitution was the general power of taxation which it would confer on the national government, and the particular power of laying imposts. Mr. Ellsworth was eminently qualified to explain and defend the proposed revenue system. While he contended for the necessity of giving to Congress a

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<sup>1</sup> The situation of Georgia was brought to the notice of Washington immediately after his first inauguration as President of the United States, in an address presented to him by the legislature of the state, in which they set forth two prominent subjects on which they looked for protection to "the influence and power of the Union." One of these was the exposure of their frontier to the ravages of the Creek Indians. The other was the escape of their slaves into Florida, whence they had never been able to reclaim them. Both of these matters received the early attention of Washington's administration.

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The action of Connecticut completed the list of the states that ratified the Constitution without any formal record of objections, and without proposing or insisting upon amendments. The opposition in these five states had been overcome by reason and argument, and they were a majority of the whole number of states whose accession was necessary to the establishment of the government. But a new act in the drama was to open with the new year. The conventions of Massachusetts, New York, and Virginia were still to meet, and each of them was full of elements of opposition of the most formidable character, and of different kinds, which made the result in all of them extremely doubtful. If all the three were to adopt the Constitution, still one more must be gained from the states of New Hampshire, Maryland, and North and South Carolina. The influence of each accession to the Constitution on the remaining states might be expected to be considerable; but, unfortunately, the convention of New Hampshire was to meet five months before those of Virginia and New York, and a large number of its members had been instructed to reject the Constitution. If New Hampshire and Massachusetts were to refuse their assent in the course of the winter, the states that were to act in the spring could scarcely be expected to withstand the

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untoward influence of such an example, which would probably operate with a constantly accelerating force throughout the whole number of the remaining states.

The convention of Massachusetts commenced its session on the 9th of January, the same day on which that of Connecticut closed its proceedings. The state certainly held a very high rank in the Union. Her Revolutionary history was filled with glory; with sufferings cheerfully borne; with examples of patriotism that were to give her enduring fame. The blood of martyrs in that cause, which she had made from the first the cause of the whole country, had been poured profusely upon her soil, and in the earlier councils of the Union she had maintained a position of commanding influence. But there had been in her political conduct, since the freedom of the country was achieved, an unsteadiness and vacillation of which her former reputation gave no pre-sage. In 1783 the legislature had refused to give the revenue powers asked for by the Congress, for the miserable reason that the Congress had granted half-pay for life to the officers of the Revolutionary army. In May, 1785, the legislature adopted a resolution for a convention of the states to consider the subject of enlarging the powers of the federal Union, and in the following November they rescinded it. These, and other occurrences, when remembered, gave the friends of the Constitution elsewhere great anxiety, as they turned their eyes towards Massachusetts. They were fully aware, too, that the recent insurrection in that state, and the severe measures which had followed it, had created divisions in society which it would be difficult, if not impossible, to heal.

But it was not easy for the most intelligent men out of the state to appreciate fully all the causes that exposed the Constitution of the United States to a peculiar hazard in Massachusetts, and made it necessary to procure its ratification by a kind of compromise with the opposition for a scheme of amendments. In no state was the spirit of liberty more jealous and exacting. In the midst of the Revolution, and led by the men who had carried on the profound discussions which preceded it—discussions in which the natural rights of mankind and the civil rights of British subjects were examined and displayed as they had never been before—the people of Massachusetts had framed a state constitution filled with the most impressive maxims and the most solemn se-

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curities with which public liberty has ever been invested. Not content to trust obvious truths to implication, they expressly declared that government is instituted for the happiness and welfare of the governed, and they fenced it round not only with the chief restrictions gained by their English ancestors, from Magna Charta down to the Revolution of 1688, but with many safeguards which had not descended to them from Runnymede or Westminster. It may be that an anxious student of politics, examining the early constitution of Massachusetts—happily in its most important features yet unchanged—would pronounce it unnecessarily careful of personal rights and too jealous for the interests of liberty. But no intelligent mind, thoughtful of the welfare of society, can now think that to have been an excess of wisdom which formed a constitution of republican government that has so well withstood the assaults of faction and the levelling tendencies of a levelling age, and has withstood them because, while it carefully guarded the liberties of the people, it secured those liberties by institutions which stand as bulwarks between the power of the many and the rights of the few.

It may hereafter become necessary for me to consider what degree of importance justly belongs to the amendments which the state of Massachusetts, and to those which other states, so impressively insisted ought to be made to the Constitution of the United States. Without at present turning further aside from the narrative of events, I content myself here with observing that, whether the alleged defects in the Constitution were important or unimportant, a people educated as the people of Massachusetts had been would naturally regard some provisions as essential which they did not find in the plan presented to them.

The general aspect of parties in Massachusetts, down to the time when the convention met, has been already considered. In the convention itself there was a majority originally opposed to the Constitution; and if a vote had been taken at any time before the proposition for amendments was brought forward, the Constitution would have been rejected. The opposition consisted of a full representation of the various parties and interests already described as existing among the people of the state who were unfriendly to it. One contemporary account gives as many as eighteen or twenty members who had actually been out in what

was called Shays's "army." Whether this enumeration was strictly correct or not, it is well known that the western counties of the state sent a large number of men whose sympathies were with that insurrection, who were friends of paper money and tender laws, and enemies of any system that would promote the security of debts. The members from the province of Maine had their own special objects to pursue. In addition to these were the honest and well-meaning doubters, who had examined the Constitution with care and objected to it from principle. The anticipated leader of this miscellaneous host was that celebrated and ardent patriot of the Revolution, Samuel Adams. With all his energy and his iron determination of character, however, he could be cautious when caution was expedient. He had read the Constitution, and all the principal publications respecting it which had then appeared, and down to the time of the meeting of the convention he had maintained a good deal of reserve. But it was known that he disapproved of it.

This remarkable man—often called the American Cato—was far better fitted to rouse and direct the storms of revolution than to reconstruct the political fabric after revolution had done its work. He had the passionate love of liberty, fertility of resource, and indomitable will which are most needed in a truly great leader of a popular struggle with arbitrary power. But, that struggle over, his usefulness in an emergency, like the one in which Massachusetts was now placed, was limited to the actual necessity for the intervention of an extreme devotion to the maxims and principles of popular freedom. He believed that there was such a necessity, and he acted always as he believed. But his influence, at this time, was by no means commensurate with his power and reputation at a former day, and he appears to have wisely avoided a direct contest with the large body of very able men who supported the Constitution.

That body of men would certainly have been, in any assembly convened for such a purpose, an overmatch in debate for Samuel Adams; for they were the civilians Fisher Ames, Parsons, King, Sedgwick, Gorham, Dana, Gore, Bowdoin, and Sumner, the Revolutionary officers Heath, Lincoln, and Brooks, and several of the most distinguished clergymen in the state. The names of the members who acted on the same side with Mr. Adams, and were

then regarded as leaders of the opposition, have reached posterity in no other connection.<sup>1</sup> But some of the elements of which that opposition was composed could not be controlled by any superiority in debate, and were, therefore, little in need of great powers of discussion or great wisdom in council. So far as their objections related to the powers to be conferred on the general government, or to the structure of the proposed system, they could be answered, and many of them could be, and were, convinced. But with respect to what they considered the defects of the Constitution, theoretical reasoning, however able, could have no influence over men whose minds were made up; and it became, as the reader will see, necessary to make an effort to gain a majority by some course of action which would involve the concession that the proposed system required amendment.

There were great hazards attending this course, in reference to its effect on other states, although it was not impossible to procure by it the ratification of this convention. Notwithstanding all that had detracted from the former high standing of the state—notwithstanding the easy explanation that might be given of the influence of her late internal disturbances upon her subsequent political affairs—she was still Massachusetts; still she was the eldest of all the states but one—still she held in the sacred places of her soil the bones of the first martyrs to liberty—still she was renowned, as she has ever been, for her intelligence—still she wore a name of more than ordinary consideration among her sisters of the Confederacy. If it should go forth to New York, to Virginia, to the Carolinas, that Massachusetts had pronounced the Constitution unfit for the acceptance of a free people, or had declared that public liberty could not be preserved under it without the addition of provisions which its framers had not made, the effect might be disastrous beyond all previous calculation. The legislature of New York, in session at the same time with the convention of Massachusetts, was much divided on the question of submitting the Constitution to a convention, and it was the opinion of careful observers that the result in either way in the latter state would

<sup>1</sup> Three of them, Widgery, Thompson, and Nason, were from Maine; there was a Dr. Taylor from the county of Worcester, and a Mr. Bishop from the county of Bristol. These gentlemen carried on the greater part of the discussion against the Constitution.

influence that in the former. In Virginia the elections for their convention were soon to take place. In Pennsylvania the minority were becoming restless under their defeat, and were agitating plans which looked to the obstruction of the government when an attempt should be made to organize it. The convention of South Carolina was not to meet until May, and North Carolina stood in an extremely doubtful position. A great weight of responsibility rested, therefore, upon the convention of Massachusetts.

Its proceedings commenced with a desultory debate upon the several parts of the instrument, which lasted until the 30th of January; the friends of the Constitution having carefully provided, by a vote at the outset, that no separate question should be taken. The discussion of the various objections having been exhausted, Parsons<sup>1</sup> moved that the instrument be assented to and ratified. One or two general speeches followed this motion, and then Hancock, the president of the convention, descended from the chair, and, with some conciliatory observations, laid before it a proposition for certain amendments. This step was not taken by him upon his own suggestion merely, although he was doubtless very willing to be the medium of a reconciliation between the contending parties. He was at that time governor of the state, and had been placed in the chair of the convention, partly in deference to his official station and his personal eminence, and partly because he held a rather neutral position with respect to the Constitution. These circumstances, as well as his Revolutionary distinction, led the friends of the Constitution to seek his intervention; and his love of popularity and deference made the office of arbitrator exceedingly agreeable to him. The selection was a wise one, for Hancock had great influence with the classes of men composing the opposition, and he could not be suspected of any undue admiration of the system the adoption of which he was to recommend.

He proceeded with characteristic caution. It does not appear, from what is preserved of the remarks with which he presented his amendments, whether he intended they should become a condition precedent to the ratification, or should be adopted as a recommendation subsequent to the assent of the convention to the Constitution then before it. He brought them forward, he said,

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<sup>1</sup> Theophilus Parsons, afterwards the celebrated chief-justice of Massachusetts.

to quiet the apprehensions and remove the doubts of gentlemen, relying on their candor to bear him witness that his wishes for a good constitution were sincere. But the form of ratification which he proposed contained a distinct and separate acceptance of the Constitution, and the amendments followed it, with a recommendation that they "be introduced into the said Constitution." Samuel Adams, with much commendation of the governor's proposition, immediately affected to understand it as recommending conditional amendments, and advocated it in that sense. Other members of the opposition understood it in the opposite sense, and, fearing its effect, insisted that the convention had no power to propose amendments, and that there could be no probability that, if recommended to the attention of the first Congress that might sit under the Constitution, they would ever be adopted. Upon both of these points the arguments of the other side were sufficient to convince a few of the more candid members of the opposition, and the Constitution was ratified on the 7th of February by a majority of nineteen votes,<sup>1</sup> the ratification being followed by a recommendation of certain amendments, and an injunction addressed to the representatives of the state in Congress to insist at all times on their being considered and acted upon in the mode provided by the fifth article of the Constitution.

The smallness of the majority in favor of the Constitution was in a great degree compensated by the immediate conduct of those who had opposed it. Many of them, before the final adjournment, expressed their determination, now that it had received the assent of a majority, to exert all their influence to induce the people to anticipate the blessings which its advocates expected from it. They acted in accordance with their professions; and those portions of the people whose sentiments they had represented exhibited generally the same candor and patriotism, and acquiesced at once in the result. This course of the opposition in Massachusetts was observed elsewhere, and largely contributed to give to the action of the state, in proposing amendments, a salutary influence in some quarters, which would otherwise have probably failed to attend it.

The amendments proposed by the convention of Massachusetts

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<sup>1</sup> Yeas, 187; nays, 168.

were, as was claimed by those who advocated them, of a general, and not a local character; but they were at the same time highly characteristic of the state. They may be divided into three classes. One of them embraced that general declaration which was afterwards incorporated with the amendments to the Constitution, and which expressly reserved to the states or the people the powers not delegated to the United States. Another class of them comprehended certain restraints upon the powers granted to Congress by the Constitution, with respect to elections, direct taxes, the commercial power, the jurisdiction of the courts, and the power to consent to the holding of titles or offices conferred by foreign sovereigns. The third class contemplated the two great provisions of a presentment by a grand jury, for crimes by which an infamous or a capital punishment might be incurred, and trial by jury in civil actions at the common law between citizens of different states.

The people of Boston, although in general strongly in favor of the Constitution, had carefully abstained from every attempt to influence the convention. But now that the ratification was carried they determined to give to the event all the importance that belonged to it, by public ceremonies and festivities. On the 17th of February there issued from the gates of Faneuil Hall an imposing procession of five thousand citizens, embracing all the trades of the town and its neighborhood, each with its appropriate decorations, emblems, and mottoes. In the centre of this long pageant, to mark the relation of everything around it to maritime commerce, and the relation of all to the new government, was borne the ship *Federal Constitution*, with full colors flying, and attended by the merchants, captains, and seamen of the port.<sup>1</sup> On the following day the rejoicings were terminated by a public banquet, at which each of the states that had then adopted the Constitution was separately toasted, the minorities of Connecticut and Massachusetts were warmly praised for their frank and patriotic submission, and strong hopes were expressed of the State of New York.

In this manner the Federalists of Massachusetts wisely sought to kindle the enthusiasm of the country, and to conciliate the opinion of the states which were still to act, in favor of the new

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<sup>1</sup> This was the first of a series of similar pageants, which took place in the other principal cities of the Union, in honor of the ratification of the Constitution.



Constitution. The influence of their course did not fail in some quarters. In the convention of New Hampshire, which assembled immediately after that of Massachusetts was adjourned, although there was a majority who, either bound by instructions or led by their own opinions, would have rejected the Constitution if required to vote upon it immediately, yet that same majority was composed chiefly of men willing to hear discussion, willing to be convinced, and likely to feel the influence of what had occurred in the leading state of New England. There was a body of Federalists in New Hampshire acting in concert with the leading men of that party in Massachusetts. They caused the same form of ratification and the same amendments which had been adopted in the latter state, with some additional ones, to be presented to their own convention.<sup>1</sup> The discussions changed the opinions of many of the members, but it was not deemed expedient to incur the hazard of a vote. The friends of the Constitution found it necessary to consent to an adjournment, in order that the instructed delegates might have an opportunity to lay before their constituents the information which they had themselves received, and of which the people in the more remote parts of the state were greatly in need. Unfortunately, however, for the course of things in other states, the occurrence of a general election in New Hampshire made it necessary to adjourn the convention until the middle of June. We have seen what was the effect of this proceeding in Virginia, where it was both misunderstood and misrepresented. But it saved the Constitution in New Hampshire.

Six states only, therefore, had adopted the Constitution at the opening of the spring of 1788. The convention of Maryland assembled at Annapolis on the 21st of April. The convention of

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<sup>1</sup> The form of ratification and the amendments introduced by Hancock into the convention of Massachusetts were drawn by Theophilus Parsons. They were probably communicated to General Sullivan, the president of the New Hampshire convention, by his brother, James Sullivan, an eminent lawyer of Boston, afterwards governor of Massachusetts. The reader should compare the Massachusetts amendments with those of the other states whose action followed that of Massachusetts, for the purpose of seeing the influence which they exerted. (All the amendments may be found in the Journals of the Old Congress, Vol. XIII., Appendix.) See also post, Chap. XXXV., as to the effect of the course of Massachusetts on the mind of Jefferson.

South Carolina was to follow in May, and the conventions of Virginia and New York were to meet in June. So critical was the period in which the people of Maryland were to act, that Washington considered that a postponement of their decision would cause the final defeat of the Constitution; for if, under the influence of such a postponement, following that of New Hampshire, South Carolina should reject it, its fate would turn on the determination of Virginia.

The people of Maryland appear to have been fully aware of the importance of their course. They not only elected a large majority of delegates known to be in favor of the Constitution, but a majority of the counties instructed their members to ratify it as speedily as possible, and to do no other act. This settled determination not to consider amendments, and not to have the action of the state misinterpreted or its influence lost, gave great dissatisfaction to the minority. Their efforts to introduce amendments were disposed of quite summarily. The majority would entertain no proposition but the single question of ratification, which was carried by sixty-three votes against eleven, on the 28th of April.

On the 1st of May there were public rejoicings and a procession of the trades, in Baltimore, followed by a banquet, a ball, and an illumination. In this procession the miniature ship *Federalist*, which was afterwards presented to Washington, and long rode at anchor in the Potomac opposite Mount Vernon, was carried, as the type of commerce and the consummate production of American naval architecture.<sup>1</sup> The next day a packet sailed from the port of Baltimore for Charleston, carrying the news of the ratification by Maryland.<sup>2</sup> In how many days this "coaster"

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<sup>1</sup> This little vessel sailed from Baltimore on the 1st of June, and arrived at Mount Vernon, "completely rigged and highly ornamented," on the 8th. It was a fine specimen of the then state of the mechanic arts. See an account of it in Washington's Works, IX. 375, 376.

<sup>2</sup> There was then no land communication between the two places that could have carried intelligence in less than a month. A letter written by General Pinckney to Washington on the 24th of May, announcing the result in South Carolina, was more than four weeks on its way to Mount Vernon. (Washington's Works, IX. 389.) Washington had received the same news by way of Baltimore soon after its arrival there.

performed her voyage is not known ; but it is a recorded, though now forgotten, fact among the events of this period, that on her return to Baltimore, where she arrived on Saturday, the 31st of May, the same vessel brought back the welcome intelligence that on the 23d of that month, "at five o'clock in the afternoon," the convention of South Carolina had ratified the Constitution of the United States. A salute of cannon on Federal Hill, in the neighborhood of Baltimore, spread the joyful news far down the waters of the Chesapeake to the shores of Virginia, and bold express riders placed it in Philadelphia before the following Monday evening.

Such was the anxiety with which the friends of the Constitution in the centre of the Union watched the course of events in the remaining states. The accession of South Carolina was naturally regarded as very important. Her delegates in the national Convention had assumed what might be thought, at home and elsewhere, to be a great responsibility. They had taken a prominent part in the settlement of the compromises which became necessary between the Northern and the Southern States. They had consented to a full commercial power, to be exercised by a majority in both houses of Congress ; to a power to extinguish the slave-trade in twenty years ; and to a power of direct and indirect taxation, exports alone excepted. Would the people of South Carolina consider the provisions made for their peculiar demands as equivalents for what had been surrendered ? Would they acquiesce in a system founded in the necessities for local sacrifices, standing as they did at the extremity of the interests involved in the Southern side of the adjustment ?

It is not probable that the people of South Carolina, at the time of their adoption of the Constitution, supposed that they had any solid reasons for dissatisfaction with such of its arrangements as in any way concerned the subject of slavery. A good deal was said, *ad captandum*, by the opponents of the Constitution, on these points, but it does not appear to have been said with much effect. No man who has ever been placed by the state of South Carolina in a public position has been more true to her interests and rights than General Pinckney ; and General Pinckney furnished to the people of the state—speaking from his place in the legislature on his return from the national Convention—what he considered, and they received, as a complete answer to all that was addressed to

their local fears and prejudices, on these particular topics. When he had shown that, by the universal admission of the country, the Constitution had given to the general government no power to emancipate the slaves within the several states, and that it had secured a right which did not previously exist, of recovering those who might escape into other states; that the slave-trade would remain open for twenty years, a period that would suffice for the supply of all the labor of that kind which the state would require; and that the admission of the blacks into the basis of representation was a concession in favor of the state of singular importance as well as novelty, he had disposed of every ground of opposition relating to these points. And so the people of the state manifestly considered.

But there was one part of the arrangements included in the Constitution on which they appear to have thought that they had more reason to pause; and it is quite important that we should understand both the grounds of their doubt and the grounds on which they yielded their assent to this part of the system. South Carolina was then, and was ever likely to be, an exporting state. Some of her people feared that, if a full power to regulate commerce by the votes of a majority in the two houses of Congress were to be exercised in the passage of a navigation act, the Eastern States, in whose behalf they were asked to grant such a power, would not be able to furnish shipping enough to export the products of the planting states. This apprehension arose entirely from a want of information; which some of the friends of the Constitution supplied, while it was under discussion. They showed that, if all the exported products of Virginia, the Carolinas, and Georgia were obliged to be carried in American bottoms, the Eastern States were then able to furnish more than shipping enough for the purpose; and that this shipping must also compete with that of the Middle States. Still it remained true that the grant of the commercial power would enable a majority in Congress to exclude foreign vessels from the carrying trade of the United States, and so far to enhance the freights on the products of South Carolina. What then were the motives which appear to have led the convention of that state to agree to this concession of the commercial power?

It is evident from the discussions which took place in the legis-

lature, and which had great influence in the subsequent convention, that the attention of the people of South Carolina was not confined to the particular terms and arrangements of the compromises which took place in the formation of the Constitution. They looked to the propriety, expediency, and justice of a general power to regulate commerce, apart from the compromise in which it was involved. They admitted the commercial distresses of the Northern States; they saw the policy of increasing the maritime strength of those states, in order to encourage the growth of a navy; and they considered it neither prudent, nor fit, to give the vessels of all foreign nations a right to enter American ports at pleasure, in peace and in war, and whatever might be the commercial legislation of those nations towards the United States. For these reasons a large majority of the people of South Carolina were willing to make so much sacrifice, be it more or less, as was involved in the surrender to a majority in Congress of the power to regulate commerce.<sup>1</sup>

Still, the Constitution was not ratified without a good deal of opposition on the part of a considerable minority. As the convention drew towards the close of its proceedings, an effort was made to carry an adjournment to the following autumn, in order to gain time for the anticipated rejection of the Constitution by Virginia. This motion probably stimulated the convention to act more decisively than they might otherwise have done, for it touched the pride of the state in the wrong direction. After a spirited discussion it was rejected by a majority of forty-six votes, and the Constitution was thereupon ratified by a majority of seventy-six. Several amendments were then adopted, to be presented to Congress for consideration, three of which were substantially the same with three of those proposed by Massachusetts.<sup>2</sup>

On the 27th of May there was a great procession of the trades, in Charleston, in honor of the accession of the state, in which the ship *Federalist*, drawn by eight white horses, was a conspicuous object, as it had been in the processions of other cities.

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<sup>1</sup> See the course of argument of Edward Rutledge, General Pinckney, Robert Barnwell, Commodore Gillon, and others, as given in Elliot, IV. 253-316.

<sup>2</sup> See the Amendments, Journals of the Old Congress, Vol. XIII., Appendix.

## CHAPTER XXXV.

### RATIFICATIONS OF NEW HAMPSHIRE, VIRGINIA, AND NEW YORK, WITH PROPOSED AMENDMENTS.

SOUTH CAROLINA was the eighth state that had ratified the Constitution, and one other only was required for its inauguration. In this posture of affairs the month of May in the year 1788 was closed. An intense interest was to be concentrated into the next two months, which were to decide the question whether the Constitution was ever to be put into operation. The convention of Virginia was to meet on the 2d, and that of New York on the 17th, of June; the convention of New Hampshire stood adjourned to the 18th of the same month. The latter assembly was to meet at Concord, from which place intelligence would reach the Middle and Southern States through Boston and the city of New York. The town of Poughkeepsie, where the convention of New York was to sit, lay about midway between the cities of Albany and New York, on the east bank of the Hudson. The land route from the city of New York to Richmond, where the convention of Virginia was to meet, was of course through the city of Philadelphia. The distance from Concord to Poughkeepsie, through Boston, Springfield, and Hudson, was about two hundred and fifty miles. The distance from Poughkeepsie to Richmond, through the cities of New York, Philadelphia, and Baltimore, was about four hundred and fifty miles. The public mails, over any part of these distances, were not carried at a rate of more than fifty miles for each day, and over a large part of them they could not have been carried so fast. The information needed at such a crisis could not wait the slow progress of the public conveyances.

No one could tell how long the conventions of New York and Virginia might be occupied with the momentous question that was to come before them. It was evident, however, that there was to be a great struggle in both of them, and it was extremely impor-

tant that intelligence of the final action of New Hampshire should be received in both at the earliest practicable moment. For, whatever might be the weight due to the example of New Hampshire under other circumstances, if, before the conventions of New York and Virginia had decided, it should appear that nine states had ratified the Constitution, the course of those bodies might be materially influenced by a fact of so much consequence to the future position of the Union, and to the relations in which those two states were to stand to the new government. It was equally important, too, that whatever might occur in the conventions of New York and Virginia should be known respectively in each of them, as speedily as possible. About the middle of May, therefore, Hamilton arranged with Madison for the transmission of letters between Richmond and Poughkeepsie by horse expresses; and by the 12th of June he had made a similar arrangement with Rufus King, General Knox, and other Federalists at the East, for the conveyance from Concord to Poughkeepsie of intelligence concerning the result in New Hampshire.

A very full convention of delegates of the people of Virginia assembled at Richmond on the 2d of June, embracing nearly all the most eminent public men of the state, except Washington and Jefferson. All parties felt the weight of responsibility resting upon the state. Every state that had hitherto acted finally on the subject had ratified the Constitution; in three of them it had been adopted unanimously; in several of the others it had been sanctioned by large majorities; and in those in which amendments had been proposed they had not been made conditions precedent to the adoption. So far, therefore, as the voice of any state had pronounced the Constitution defective, or dangerous to any general or particular interest, the mode of amendment provided by it, to be employed after it had gone into operation, had been relied upon as sufficient and safe. The opposition in Virginia were consequently reduced to this dilemma: they must either take the responsibility of rejecting the Constitution entirely, or they must assume the equally hazardous responsibility of insisting that the ratification of the state should be given only upon the condition of previous amendments. They were prepared to do both, or either, according to the prospects of success; for their convictions were fixed against the system proposed; their abilities, patriot-

ism, courage, and personal influence were of a high order; and their devotion to what they deemed the interests of Virginia was unquestionable.

They were led, as I have already said they were to be, by Patrick Henry, whose reputation had suffered no abatement since the period when he blazed into the darkened skies of the Revolution—when his untutored eloquence electrified the heart of Virginia, and became, as has been well said, even “a cause of the national independence.”<sup>1</sup> He had held the highest honors of the state, but had retired, poor, and worn down by twenty years of public service, to rescue his private affairs by the practice of a profession which, in some of its duties, he did not love, and for which he had, perhaps, a single qualification in his amazing oratorical powers. His popularity in Virginia was unbounded. It was the popularity that attends genius, when thrown with heart and soul, and with every impulse of its being, into the cause of popular freedom; and it was a popularity in which reverence for the stern independence and the self-sacrificing spirit of the patriot was mingled with admiration for the splendid gifts of oratory which Nature, and Nature alone, had bestowed upon him. But Mr. Henry was rightly appreciated by his contemporaries. They knew that, though a wise man, his wisdom lacked comprehensiveness, and that the mere intensity with which he regarded the ends of public liberty was likely to mislead his judgment as to the means by which it was to be secured and upheld. The chief apprehension of his opponents, on this important occasion, was lest the power of his eloquence over the feelings or prejudices of his auditory might lead the sober reflections of men astray.

He was at this time fifty-two years of age. Although feeling or affecting to feel himself an old and broken man, he was yet undoubtedly master of all his natural powers. Those powers he exerted to the utmost to defeat the Constitution in the convention of Virginia. He employed every art of his peculiar rhetoric, every resource of invective, of sarcasm, of appeal to the fears of his audi-

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<sup>1</sup> Notice of Henry, in the National Portrait Gallery of Distinguished Americans, Vol. II. Mr. Jefferson has said that Henry's power as a popular orator was greater than that of any man he had ever heard, and that Henry “appeared to speak as Homer wrote.” Jefferson's Works, I. 4.



ence for liberty ; every dictate of local prejudice and state pride. But he employed them all with the most sincere conviction that the adoption of the proposed Constitution would be a wrong and dangerous step. Nor is it surprising that he should have so regarded it. He had formed to himself an ideal image which he was fond of describing as the American spirit. This national spirit of liberty, erring perhaps at times, but in the main true to right and justice as well as to freedom, was with him a kind of guardian angel of the republic. He seems to have considered it able to correct its own errors without the aid of any powerful system of general government—capable of accomplishing in peace all that it had unquestionably effected for the country in war. As he passed out of the troubles and triumphs of the Revolution into the calmer atmosphere of the Confederation, his reliance on this American spirit, and his jealousy for the maxims of public liberty, led him to regard that system as perfect, because it had no direct legislative authority. He could not endure the thought of a government, external to that of Virginia, and yet possessed of the power of direct taxation over the people of the state. He regarded with utter abhorrence the idea of laws binding the people of Virginia by the authority of the people of the United States; and thinking that he saw in the Constitution a purely national and consolidated government, and refusing to see the federal principle which its advocates declared was incorporated in its system of representation, he shut his eyes resolutely upon all the evils and defects of the Confederation, and denounced the new plan as a monstrous departure from the only safe construction of a union. He belonged, too, to that school of public men, some of whose principles in this respect it is vain to question, who considered a bill of rights essential in every republican government that is clothed with powers of direct legislation.

On the first day of the session, at the instance of Mr. Mason, the convention determined not to take a vote upon any question until the whole Constitution had been debated by paragraphs; but the discussions, in fact, ranged over the whole instrument without any restriction. The opposition was opened by Henry, in a powerful speech of a general nature, in which he demanded the reasons for such a radical change in the character of the general government. That the new plan was a consolidated government,

and not a confederacy, he held to be indisputable. The language of the preamble, which said *We, the People*, and not *We, the States*, made this perfectly clear. But states were the characteristics and the soul of a confederation. If states were not to be the agents of this new compact it must be one great, consolidated, national government of the people of all the states. This perilous innovation, altogether beyond the powers of the Convention which had proposed it, had given rise to differences of opinion which had gone to inflammatory resentments in different parts of the country. He denied altogether the existence of any necessity for exposing the public peace to such a hazard.

As soon as Henry had sat down, the governor, Edmund Randolph, rose, to place himself in a position of some apparent inconsistency. He had, as we have seen, refused to sign the Constitution. On his return to Virginia he had addressed a long, exculpatory letter to the Speaker of the House of Delegates, giving his reasons for this refusal; which were, in substance, that he considered the Constitution required important amendments, and that, as it would go to the conventions of the states to be accepted or rejected as a whole, without power to amend, he thought that his signature would preclude him from proposing the changes and additions which he deemed essential. This letter had attracted much attention both in and out of Virginia, and Randolph was consequently, up to this moment, regarded as a firm opponent of the Constitution. He chose, however, to incur the charge of that kind of inconsistency which a statesman should never hesitate to commit, when he finds that the public good is no longer consistent with his adherence to a former opinion. He declared that the day of previous amendments had passed. The ratification of the Constitution by eight states had placed Virginia and the country in a critical position. If the Constitution should not be adopted by the number of states required to put it into operation there could be no Union; and if it were to be ratified by that number, and Virginia were to reject it, she would have at least two states at the south of her which would belong to a confederacy of which she would not be a member. He should, therefore, vote for the unconditional adoption of the Constitution, looking to future amendments, although he had little expectation that they would be made.

This announcement took the opposition by surprise. But they relaxed none of their efforts. They subjected every part of the Constitution to a rigid scrutiny, and to the most subtle course of reasoning, as well as to one which addressed the prejudices of the common mind. Some of the most important only of the topics on which they enlarged can be noticed here.

Their first and chief object was to show that the Constitution presented a national and consolidated government, in the place of the Confederation, and that under such a government the liberties of the people of the states could not be secure. This character of the proposed government Mr. Mason deduced from the power of direct taxation; which, he contended, entirely changed the Confederacy into one consolidated government. This power, being at discretion and unrestrained, must carry everything before it. The general government being paramount to, and in every respect more powerful than, the state governments, the latter must give way; for two concurrent powers of direct taxation cannot long exist together. Assuming that taxes were to be levied for the use of the general government, the mode in which they were to be assessed and collected was of the utmost consequence, and it ought not to be surrendered by the people of Virginia to those who had neither a knowledge of their situation nor a common interest with them. He would cheerfully acquiesce in giving an effectual alternative for the power of direct taxation. He would give the general government power to demand their quotas of the states, with an alternative of laying direct taxes in case of non-compliance. The certainty of this conditional power would, in all probability, prevent the application of it, and the sums necessary for the Union would then be raised by the states, and by those who would best know how they could be raised.

Mr. Henry took a broader ground. He argued that the Constitution presented a consolidated government, because it spoke in the name of the people, and not in the name of the states. It was neither a monarchy like England—a compact between prince and people, with checks on the former to secure the liberty of the latter; nor a confederacy like Holland—an association of independent states, each retaining its individual sovereignty; nor yet a democracy, in which the people retain securely all their rights. It was an alarming transition from a confederacy to a consolidated

government. It was a step as radical as that which separated us from Great Britain. The rights of conscience, trial by jury, liberty of the press, all immunities and franchises, all pretensions to human rights and privileges, were rendered insecure, if not lost, by such a transition. It was said that eight states had adopted it. He declared that, if twelve states and a half had adopted it, he would, with manly firmness, and in spite of an erring world, reject it. "You are not to inquire," said he, "how your trade may be increased, or how you are to become a great and prosperous people, but how your liberties may be secured;" and then, kindling with the old fire of his earlier days, and with the recollection of what he had done and suffered for the liberties of his country, he broke forth in one of his most indignant and impassioned moods.<sup>1</sup>

Madison, always cool, clear, and sensible, answered these objections. He described the new government as having a mixed character. It would be in some respects federal, in others consolidated. The manner in which it was to be ratified established this double character. The parties to it were to be the people, but not the people as composing one great society, but the people as composing thirteen sovereignties. If it were a purely consolidated government, the assent of a majority of the people would be sufficient to establish it. But it was to be binding on the people of a state only by their own separate consent; and if adopted by the people of all the states, it would be a government established, not through the intervention of their legislatures, but by the people at large. In this respect the distinction between the existing and the proposed governments was very material.

The mode in which the Constitution was to be amended also displayed its mixed character. A majority of the states could not introduce amendments, nor yet were all the states required; three fourths of them must concur in alterations; and this constituted a departure from the federal idea. Again, the members of one branch of the legislature were to be chosen by the people of the states in proportion to their numbers; the members of the other

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<sup>1</sup> It is said in the newspapers of that period that Henry was on his legs in one speech for seven hours. I think it must have been the one from which I have made the abstract in the text. But he made a great many speeches, quite as earnest.

were to be elected by the states in their equal and political capacities. Had the government been completely consolidated, the Senate would have been chosen in the same way as the House; had it been completely federal, the House would have been chosen in the same way as the Senate. Thus it was of a complex nature; and this complexity would be found to exclude the evils of absolute consolidation and the evils of a mere confederacy. Finally, if Virginia were separated from all the states her power and authority would extend to all cases; in like manner were all powers vested in the general government it would be a consolidated government; but the powers of the general government are enumerated; it can only operate in certain cases; it has legislative powers on defined and limited objects, beyond which it cannot extend its jurisdiction.

With respect to the powers proposed to be conferred on the new government, he conceived that the question was whether they were necessary. If they were, Virginia was reduced to the dilemma of either submitting to the inconvenience which the surrender of those powers might occasion, or of losing the Union. He then proceeded to show the necessity for the power of direct taxation; and in answer to the apprehended danger arising from this power united with the consolidated nature of the government—thus giving it a tendency to destroy all subordinate or separate authority of the states—he admitted that, if the general government were wholly independent of the governments of the states, usurpation might be expected to the fullest extent; but as it was not so independent, but derived its authority partly from those governments and partly from the people—the same source of power—there was no danger that it would destroy the state governments.

In this manner, extending to all the details of the Constitution, the discussion proceeded for nearly a week, the opposition aiming to show that at every point it exposed the liberties of the people to great hazards; Henry sustaining nearly the whole burden of the argument on that side, and fighting with great vigor against great odds.<sup>1</sup> At length, finding himself sorely pressed, he

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<sup>1</sup> There has been, I am aware, a modern scepticism concerning Patrick Henry's abilities; but I cannot share it. He was not a man of much information, and he had no great breadth of mind. But he must have been, not only a very able debater, but a good parliamentary tactician. The manner in which he carried

took advantage of an allusion made by his opponents to the debts due from the United States to France, to introduce the name of Jefferson.

"I might," said he, "not from public authority, but from good information, tell you that his opinion is that you reject this government. His character and abilities are in the highest estimation; he is well acquainted in every respect with this country; equally so with the policy of the European nations. This illustrious citizen advises you to reject this government till it be amended. His sentiments coincide entirely with ours. His attachment to, and services done for, this country are well known. At a great distance from us, he remembers and studies our happiness. Living in splendor and dissipation, he thinks yet of bills of rights—thinks of those little, despised things called *maxims*. Let us follow the sage advice of this common friend of our happiness."<sup>1</sup>

At the time when Mr. Henry made this statement he had seen a letter written by Mr. Jefferson from Paris, in the preceding February, which was much circulated among the opposition in Virginia, and in which Mr. Jefferson had expressed the hope that the first nine conventions might accept the Constitution, and the remaining four might refuse it, until a Declaration of Rights had been annexed to it.<sup>2</sup> Mr. Henry chose to construe this into an

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on the opposition to the Constitution in the convention of Virginia, for nearly a whole month, shows that he possessed other powers besides those of great natural eloquence.

<sup>1</sup> Elliot, III. 152, Debates in the Virginia Convention.

<sup>2</sup> Under date of February 7th, 1788, Mr. Jefferson wrote from Paris, in a private letter to a gentleman in Virginia, as follows: "I wish, with all my soul, that the nine first conventions may accept the new Constitution, because this will secure to us the good it contains, which I think great and important. But I equally wish that the four latest conventions, whichever they be, may refuse to accede to it till a Declaration of Rights be annexed. This would probably command the offer of such a declaration, and thus give to the whole fabric, perhaps, as much perfection as any one of that kind ever had. By a Declaration of Rights, I mean one which shall stipulate freedom of religion, freedom of the press, freedom of commerce against monopolies, trial by juries in all cases, no suspensions of the *habeas corpus*, no standing armies. These are fetters against doing evil which no honest government should decline. There is another strong feature in the new Constitution which I as strongly dislike. That is, the perpetual re-

advice to *Virginia* to reject the Constitution. But this use of Mr. Jefferson's opinion was not strictly justifiable, since Virginia, in the actual order of events, might be the ninth state to act; for the convention of New Hampshire was not to reassemble until nearly three weeks after the first meeting of that of Virginia, in which Mr. Henry was then speaking. The friends of the Constitution, therefore, became somewhat restive under this attempt to employ the influence of Jefferson against them. Without saying anything disrespectful of him, but, on the contrary, speaking of him in the highest terms of praise and honor, they complained of the impropriety of introducing his opinion—saying that, if the opinions of important men not within that convention were to govern its deliberations, they could adduce a name at least equally great on their side;<sup>1</sup> and they then contended that Mr. Jefferson's letter did not admit of the application that had been given to it.<sup>2</sup> But the truth was, that the assertions of his opponents respecting New Hampshire, and the ambiguous form of Mr. Jefferson's opinion, gave Henry all the opportunity he wanted to employ that opinion for the purpose for which he introduced it. "You say," said he, "that you are absolutely certain New Hampshire will adopt this government. Then she will be the ninth state; and if Mr. Jefferson's advice is of any value, and this system requires

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eligibility of the president. Of this I expect no amendment at present, because I do not see that anybody has objected to it on your side the water. But it will be productive of cruel distress to our country, even in your day and mine. The importance to France and England to have our government in the hands of a friend or foe will occasion their interference by money, and even by arms. Our president will be of much more consequence to them than a king of Poland. We must take care, however, that neither this nor any other objection to the new form produces a schism in our Union. That would be an incurable evil, because near friends falling out never reunite cordially; whereas, all of us going together, we shall be sure to cure the evils of our new Constitution before they do great harm." (Jefferson's Works, II. 355.) That Mr. Jefferson intended this letter should be used as it was in the convention of Virginia, is not probable; but it would seem from the care he took to state a plan of proceeding in the adoption of the Constitution, that he intended his suggestions should be known. His subsequent opinion will be found in a note below.

<sup>1</sup> Alluding, evidently, to Washington.

<sup>2</sup> See the speeches of Pendleton and Madison, in reply to Henry. Elliot, III. 304, 329.

amendments, we, who are to be one of the four remaining states, ought to reject it until amendments are obtained.”<sup>1</sup>

Notwithstanding the efforts of Madison to counteract this artifice, it gave the opposition great strength, because it enabled them to throw the whole weight of their arguments against the alleged defects and dangers of the Constitution into the scale of an absolute rejection. Mr. Jefferson's subsequent opinion, formed after he had received intelligence of the course of Massachusetts, had not then been received, and indeed did not reach this country until after the convention of Virginia had acted.<sup>2</sup> The opposition went on, therefore, with renewed vigor, to attack the Constitution in every part which they considered vulnerable.

Among the topics on which they expended a great deal of force was that of the navigation of the Mississippi. They employed this subject for the purpose of influencing the votes of members who represented the interests of that part of Virginia which is now Kentucky. They first extorted from Madison and other gentlemen, who had been in the Congress of the Confederation, a statement of the negotiations which had nearly resulted in a temporary surrender of the right in the Mississippi to Spain.<sup>3</sup> They then made use of the following argument. It had appeared, they said, from those transactions, that the Northern and Middle States, seven in number,<sup>4</sup> were in favor of bartering away this

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<sup>1</sup> Elliot, III. 314.

<sup>2</sup> On the 27th of May, 1788, Mr. Jefferson wrote from Paris to Colonel Carrington, as follows: “I learn with great pleasure the progress of the new Constitution. Indeed, I have presumed it would gain on the public mind, as I confess it has on my own. At first, though I saw that the great mass and groundwork was good, I disliked many appendages. Reflection and discussion have cleared off most of those. You have satisfied me as to the query I had put to you about the right of direct taxation. My first wish was that nine states would adopt it, and that the others might, by holding off, produce the necessary amendments. But the plan of Massachusetts is far preferable, and will, I hope, be followed by those who are yet to decide,” etc. (Jefferson's Works, II. 404.) Colonel Carrington, the person to whom this letter was addressed, was a member of Congress, and received it at New York, about the 2d of July, when it was seen by Madison. See a letter from Madison to E. Randolph of that date, among the Madison papers. Elliot, V. 578.

<sup>3</sup> See the Index, *verb.* “Mississippi River.”

<sup>4</sup> They meant the four New England States and New York, Pennsylvania,



great interest for commercial privileges and advantages; that those states, particularly the Eastern ones, would be influenced further by a desire to suppress the growth of new states in the western country, and to prevent the emigration of their own people thither, as a means of retaining the power of governing the Union; and that the surrender of the Mississippi could be made by treaty, under the Constitution, by the will of the president and the votes of ten senators,<sup>1</sup> whereas, under the Confederation, it never could be done without the votes of nine states in Congress.

It must be allowed that there had been much in the history of this matter on which harsh reflections could be made by both sections of the Union. But it was not correct to represent the Eastern and Middle States as animated by a desire to prevent the settlement of the western country, or to say that they would be ready at any time to barter away the right in the Mississippi. Seven of the states had consented, in a time of war and of great peril, to the proposal of a temporary surrender of the right to Spain, just when it was supposed that negotiations between Spain and Great Britain might result in a coalition which would deprive us of the river forever, and when it was thought that a temporary cession would fix the permanent right in our favor.<sup>2</sup> This was undoubtedly an error; but it was one from which the country had been saved by the disputes which arose respecting the constitutional power of seven states to give instructions for a treaty, and by the prospect of a reconstruction of the general government. Now, therefore, that an entirely new constitutional system had been prepared, the real question, in relation to this very important subject, was one of a twofold character. It involved, first, the moral probabilities respecting the wishes and policy of a majority of the states; and, secondly, a comparison of the means afforded by the Constitution for protecting the national right to the Mississippi, with those afforded by the Confederation—assuming that any state or states might wish to surrender it.

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and Maryland. New Jersey and Delaware were supposed to be with the four Southern States on this question.

<sup>1</sup> Ten would be two thirds of the constitutional quorum of fourteen; so that the argument supposed only a quorum to be present.

<sup>2</sup> See Mr. Madison's explanation made in the convention of Virginia. Elliot, III. 346.

Upon this question Mr. Madison made an answer to the opposition which shows how accurately he foresaw the relations between the western and the eastern portions of the Union, and how justly he estimated the future working of the Constitution with respect to the preservation of the Mississippi, or any other national right.

If interest alone, he said, were to govern the Eastern States, they must derive greater advantage from holding the Mississippi than even the Southern States; for if the carrying trade were their natural province, it must depend mainly on agriculture for its support, and agriculture was to be the great employment of the western country. But in addition to this security of local interest the Constitution would make it necessary for two thirds of all the senators present—and those present would represent all the states, if all attended to their duty—to concur in every treaty. The president, who would represent the people at large, must also concur. In the House of Representatives the landed, rather than the commercial, interest would predominate; and the House of Representatives, although not to be directly concerned in the making of treaties, would have an important influence in the government. A weak system had produced the project of surrendering the Mississippi; a strong one would remove the inducement.<sup>1</sup>

In the midst of these discussions, and while the opposition were making every effort to protract them until the 23d of June—when the assembling of the legislature would afford a colorable pretext for an adjournment—Colonel Oswald of Philadelphia arrived at Richmond, with letters from the Anti-Federalists of New York and Pennsylvania to the leaders of that party at Richmond, for the purpose of concerting a plan for the postponement of the decision of Virginia until after the meeting of the convention of New York. It was supposed that, if this could be effected, the opponents of the Constitution in New York would be able to make some overture to the opposition in Virginia for the same course of action in both states. If this could not be brought about, it was considered by the opposition at Richmond that the chances of obtaining a vote for previous amendments would be materially increased by delay. The parties in their convention were nearly balanced, at this time. Mr. Madison estimated the Federal ma-

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<sup>1</sup> Debates in the Virginia Convention, Elliot, III. 344-347.

jority at not more than three or four votes, if indeed the Federalists had a majority, on the 17th of June, the day on which the convention of New York was to meet.<sup>1</sup>

But we must now leave the convention of Virginia, and turn our eyes to the pleasant village on the banks of the Hudson where the convention of New York was already assembling. Hamilton was there, and was its leading spirit. How vigilant and thoughtful he was, we know—sometimes watching for the messenger who might descend the eastern hills with reports from New Hampshire; sometimes turning to the south and listening for the footfall of his couriers from Virginia, but always preparing to meet difficulties, always ready to contest every inch of ground, and never losing sight of the great end to be accomplished. The hours were slow and heavy to him. The lines of horse-expresses which he had so carefully adjusted, and at whose intersection he stood to collect the momentous intelligence they would bring him, were indeed a marvel of enterprise at that day; but how unlike were they to the metallic lines that now daily gather for us, from all the ends of the land and with the speed of lightning, minute notices of the most trivial or the most important events! Still, such as his apparatus was, it was all that could be had; and he awaited, alike with a firm patience and a faithful hope, for the decisive results. Even at this distance of time we share the fluctuations of his anxious spirit, and our patriotism is quickened by our sympathy.


Rarely, indeed, if ever, was there a statesman having more at stake in what he could not personally control, or greater cause for solicitude concerning the public weal of his own times or that of future ages, than Hamilton now had. His own prospects of usefulness, according to the principles which had long guided him, and the happiness or the misery of his country, were all, as he was deeply convinced, involved in what might happen within any hour of those few eventful days. The rejection of the Constitution by Virginia would, in all probability, cause its rejection by New York. Its rejection by those states would, as he sincerely believed, be fol-

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<sup>1</sup> He thought at this moment that, if the Constitution should be lost, the Mississippi question would be the cause. The members from Kentucky were then generally hostile. See a letter from Madison to Hamilton, of June 16th, Hamilton's Works, I. 457.

lowed by eventual disunion and civil war. But if the Constitution could be established, he could see the way open to the happiness and welfare of the whole Union; for although it was not in all respects the system that he would have preferred, he had shown, in the *Federalist*, how profoundly he understood its bearing upon the interests of the country, into what harmony he could bring its various provisions, and what powerful aid he could give in adjusting it into its delicate relations to the states. He had, too, already conceived the hope that its early administration might be undertaken by Washington; and with the government in the hands of Washington, Hamilton could foresee the success which to us is now historical.

To say that Hamilton was ambitious, is to say that he was human; and he was by no means free from human imperfections. But his was the ambition of a great mind, regulated by principle, and made incapable, by the force and nature of his convictions, of seeking personal aggrandizement through any course of public policy of which those convictions were not the mainspring and the life. In no degree is the character of any other American statesman undervalued or disparaged, when I insist on the importance to all America, through all time, of Hamilton's public character and conduct in this respect. It was because his future opportunities for personal distinction and usefulness were now evidently at stake in the success of a system that would admit of the exercise of his great powers in the service of the country—a system that would afford at once a field for their exercise and for the application of his political principles; and because he could neither seek nor find distinction in a line of politics which tended to disunion—that his position at this time is so interesting and important. As a citizen of New York, too, his position was personally critical. He had carried on a vigorous contest with the opponents of the Constitution in that state; he had encountered obloquy and misrepresentation and rancor—perhaps he had provoked them. He had told the people of the state, for years, that they had listened to wrong counsels when they had lent themselves to measures that retarded the growth of a national spirit and an efficient general government. The correctness of his judgment was now, therefore, openly and palpably in the issue. His public policy, with reference to the relations of the state



to the Union, was now to stand, or to fall, with the Constitution proposed.

When he entered the convention of the state he was convinced that the Anti-Federalists were determined that New York should not become a member of the new Union, whatever might be done by the other states.<sup>1</sup> He had also received information which led him to believe that the governor, Clinton, had in conversation declared the union unnecessary; but of this, if true, he could make no public use. His suspicions were certainly justified by the tendency of the arguments made use of by the opposition, during the few first days of the session; for it was the tendency of those arguments to maintain the idea that New York could very well stand alone, even if the Constitution should be established by nine states, she refusing to be one of them. With this view they pressed the consideration under which they had all along acted, that the Confederation, if amended, would be sufficient for all the proper purposes of a general government; and their plan for such an amendment of the Confederation was, to provide that its requisitions for money should continue to be made as they had been, and that Congress should have the new power of compelling payment by force, when a state had refused to comply with a requisition.

Hamilton answered this suggestion with great energy. It is inseparable, he said, from the disposition of bodies which have a constitutional power of resistance, to inquire into the merits of a law. This had ever been the case with the federal requisitions. In this examination the states, unfurnished with the lights which directed the deliberations of the general government, and incapable of embracing the general interests of the Union, had almost uniformly weighed the requisitions by their own local interests, and had only executed them so far as answered their particular convenience or advantage. But if we have national objects to pursue, we must have national revenues. If requisitions are made and are not complied with, what is to be done? To coerce the states would be one of the maddest projects ever devised. No state would ever suffer itself to be used as the instrument of coercing another. A federal standing army, then, must enforce the requisitions, or the federal treasury would be left without supplies

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<sup>1</sup> See his correspondence with Madison, Works, I. pp. 450-469.

and the government without support. There could be no cure for this great evil but to enable the national laws to operate on individuals like the laws of the states. To take the old Confederation as the basis of a new system, and to trust the sword and the purse to a single assembly organized upon principles so defective, giving it the full powers of taxation and the national forces, would be to establish a despotism. These considerations showed clearly that a totally different government, with proper powers and proper checks and balances, must be established.

The convention soon afterwards passed to an animated discussion on the system of representation proposed in the Constitution, and while an amendment relating to the Senate was pending, on the 24th of June, Hamilton received intelligence from the East that on the 21st the convention of New Hampshire had ratified the Constitution. Up to this moment the opposition, while disclaiming earnestly all wish to bring about a dissolution of the Union, or to prevent the establishment of some firm and efficient government, had still continued, in every form, to press a line of argument which tended to produce the rejection of the Constitution proposed; and it was evident that their opponents could throw upon them the responsibility of a dissolution of the Union only by a deduction from the tendency of their reasoning. But now that the Constitution had been adopted by the number of states which its provisions required for its establishment, the Federalists determined that the opposition should publicly meet the issue raised by the new aspect of affairs, which was to determine whether the state of New York should or should not place itself out of the pale of the new confederacy, whether it should or should not stand in a hostile attitude towards the nine states which had thus signified their determination to institute a new government. Accordingly, on the next day, Chancellor Livingston formally announced in the convention the intelligence that had been received from New Hampshire, which, he said, had evidently changed the circumstances of the country and the ground of the present debate. He declared that the Confederation was now dissolved. Would they consider the situation of their country? However some might contemplate disunion without pain, or flatter themselves that some of the Southern States would form a league with them, he could not look without horror at the dan-

gers to which any such confederacy would expose the state of New York.

This dilemma embarrassed, but did not subdue, the opposition. They reiterated their denial of a purpose to produce a dissolution of the Union, doubtless with entire sincerity; but they continued the argument which was designed to show that the state ought not to adopt a system dangerous to liberty, under a fear of the situation in which it might be placed.

Here, then, the reader should pause for a moment, in order to form a just appreciation of the course pursued by Hamilton, in this altered aspect of affairs, when nothing remained to be done but to get the state of New York, if possible, into the new Union. We have now the means of knowing precisely how he estimated the chances of succeeding in this effort. On the 27th, while the discussion was still going on, he wrote to Madison as follows: "There are some slight symptoms of relaxation in some of the leaders, which authorizes a gleam of hope, if you do well; but certainly I think not otherwise."<sup>1</sup> At the same time, we know that his latest news from Virginia was not encouraging.<sup>2</sup>

How easy, then, perhaps natural, it would have been for him to have abandoned this "gleam of hope"—to have turned his back upon the state and all its cabals—to have left the Anti-Federalists to determine the fate of New York, and to have transferred himself to what was then the larger community, the great state of Pennsylvania, or to any of the other states which had adopted the Constitution! He must have been received anywhere with the consideration due to his high reputation, his abilities, his public services, and his acknowledged patriotism. He must have been regarded, in any state that had accepted the new government, as a person whose assistance was indispensable to its success; and so he would have been looked upon by the main body of the people throughout the new confederacy. He had no ties of office to bind him to the state of New York. He held one of her seats in the Congress of the Confederation, but that was a body which must soon cease to exist. His political opponents had an undoubted majority in the state. The social ties which had bound him to her soil could have been severed. He could have left her, there-

<sup>1</sup> Works, I. 462.

<sup>2</sup> See the latest letter which he had then received from Madison. *Ibid.*, 461.

fore, to the counsels of his adversaries, and could have sought and found for himself a career of ambition in the new sphere that was open to receive him. That career would have tempted men of an inferior mould, and would have seen them yield to the temptation perhaps the more readily, because the conflicts that would have been inevitable between rival confederacies would have presented fresh fields for exertion and personal energy, new excitements and new adventures. It is, too, a mournfully interesting reflection, that if Hamilton had then cut himself free from the entanglements of the local politics of New York by a change of residence, he probably could never have been drawn into that miserable quarrel with the wretch who in after-years planned his destruction, and who gained by it the execrable distinction of having taken the most important life that has ever fallen by the assassination of the duel since its opportunities for murder have been known among men.

But with whatever melancholy interest we may pursue such a suggestion of what Hamilton might have done, it needs but to be made in order to show how far he stood above the reach of such a temptation. From his first entrance, in boyhood, into public life, his patriotism had comprehended nothing less than the whole of the United States. Whatever may be thought of his policy, either before or after the Constitution was established, no just man will deny its comprehensive nationality. He now saw that no partial confederacy of the states could be of any permanent value. He had no favorite theories involved in the Constitution, no peculiar experiments that he wished to try. He embraced it, because he believed in its capacity to unite the whole of the states, to concentrate and harmonize their interests, and to accomplish national objects of the utmost importance to their welfare. It could, without doubt, be inaugurated and put into operation without the concurrence of New York. But to leave that, or any other state near the geographical centre of the Union, out of the confederacy, would be to leave its sovereignty and rights exposed to perpetual collision with the new government. No public or private purpose could have induced Hamilton to abandon any effort that might prevent such a result. He still labored, therefore, with those who were associated with him, to procure an adoption of the Constitution by the state of New York; and we must bear in mind the



vast importance of her action, and the difficulties with which he had to contend, that we may take a just view of the concessions to the opposition which he seems at one stage of the crisis to have been obliged to consider.

But we must now leave him in the midst of the embarrassments by which he was surrounded, to follow his messenger, whom he instantly despatched, on the 24th, with letters to Madison at Richmond, announcing the news of the ratification by New Hampshire. The courier passed through the city of New York on the 25th, and reached Philadelphia on the 26th. The newspapers of the latter city immediately cried out, "The reign of anarchy is over," and the popular enthusiasm rose to the highest point. The courier passed on to the South; but the convention of Virginia had, in fact, ratified the Constitution before he arrived in Philadelphia. Thus, while New Hampshire, in the actual order of events, was the ninth state to adopt the Constitution, yet Virginia herself, so far as the members of her convention were informed, appeared at the time of their voting to be the ninth adopting state. It is certain that they acted without any real knowledge of what had taken place in New Hampshire, although there may have been random assertions of what nobody at Richmond could then have known.<sup>1</sup>

The result was brought about in Virginia by the force of argument, and because the friends of the Constitution were at last able to reduce the issue to the single question of previous or subsequent, that is, of conditional or recommendatory, amendments. As the state appeared likely to be the ninth state to act, and they

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<sup>1</sup> It has been supposed that this was not so, but that Hamilton's messenger arrived at Richmond before the final action of the Virginia convention, and so that the decision of New Hampshire had an important influence. I think this is clearly a mistake. I have traced the progress of the messenger in the newspapers of that time, and find his arrival at New York and Philadelphia chronicled as it is given in the text. The dates are therefore decisive. It appears also from Mr. Madison's correspondence with Hamilton that he did not receive the despatch about New Hampshire until the 31st. (Hamilton's Works, I. 463.) The ratification passed the Virginia convention on the 25th, and that body was dissolved on the 27th. There is no trace in the Virginia debates of any authentic news from New Hampshire. On the contrary, it was assumed by one of the speakers, Mr. Innes, on the day of their ratification, that the Constitution then stood adopted by *eight* states. (Elliot, III. 636.)

could insist that, if she rejected the Constitution, she must bear the responsibility of defeating the establishment of the new government—a consequence which they could reasonably predict—they had a high vantage-ground from which to address the reason and patriotism of the assembly.

Henry and the other leaders of the opposition fought valiantly to the last. When the whole subject had been exhausted, the friends of the Constitution presented the propositions on which they were willing to rest the action of the state, and which declared, in substance, that the powers granted under the proposed Constitution are the gift of the people, and that every power not granted thereby remains with them, and at their will; consequently that no right can be abridged, restrained, or modified by the general government or any of its departments, except in those instances in which power is given by the Constitution for those purposes; and that, among other essential rights, liberty of conscience and of the press cannot be cancelled, abridged, restrained, or modified by any authority of the United States; that the Constitution ought, therefore, to be ratified, but that whatsoever amendments might be deemed necessary ought to be recommended to the consideration of the first Congress that should assemble under the Constitution, to be acted upon according to the mode prescribed therein.

Mr. Henry, on the other hand, brought forward a counter project, by which he proposed to declare that, previous to the ratification of the Constitution, a Declaration of Rights, asserting and securing from encroachment the great principles of civil and religious liberty, and the inalienable rights of the people, together with amendments to the most exceptionable parts of the Constitution, ought to be referred by the convention of Virginia to the other states in the American confederacy for their consideration.

The issue was thus distinctly made between previous or conditional and subsequent or unconditional amendments, and made in a form most favorable to the friends of the Constitution; for it enabled them to present so vigorously and vividly the consequences of suspending the inauguration of the new government until the other states could consider the amendments desired by Virginia, that they procured a rejection of Mr. Henry's resolution by a majority of eight, and a ratification of the Constitution by a

majority of ten votes. A long list of amendments, together with a bill of rights, was then adopted, to be presented to Congress for its consideration.<sup>1</sup>

The conduct of Mr. Henry, when he saw that the adoption of the Constitution was inevitable, was all that might have been expected from his patriotic and unselfish character. "If I shall be in the minority," he said, "I shall have those painful sensations which arise from a conviction of being overpowered in a good cause. Yet I will be a peaceable citizen. My head, my hand, and my heart shall be free to retrieve the loss of liberty, and remove the defects of this system in a constitutional way. I wish not to go to violence, but will wait with hopes that the spirit which predominated in the Revolution is not yet gone, nor the cause of those who are attached to the Revolution yet lost. I shall, therefore, patiently wait in expectation of seeing this government so changed as to be compatible with the safety, liberty, and happiness of the people." <sup>2</sup> This noble and disinterested patriot lived to find the Constitution all that he wished it to be, and to enroll himself, in the day of its first serious trial, among its most vigorous and earnest defenders.

But some of the members of the opposition were not so discreet. Immediately after the adjournment of the convention they prepared an address to the people, intended to produce an effort to prevent the inauguration of the new government by a combined arrangement among the legislatures of the several states. But this paper, which never saw the light, was rejected by their own party, and the opposition in Virginia subsided into a general acquiescence in the action of the convention.<sup>3</sup>

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<sup>1</sup> The form of ratification embraced the recitals given in the text respecting the powers of Congress. It was adopted by a vote of 89 to 79, on the 25th of June, 1788. I do not go into the particular consideration of the amendments proposed by several of the state conventions, because the present volume is confined to the origin, the formation, and the adoption of the Constitution, and no state that ratified the instrument proposed by the national Convention made amendments a condition. The examination of the amendments proposed, therefore, belongs to the history of the Constitution subsequent to its inauguration. They may all be found in the second volume of the present history.

<sup>2</sup> Debates in Virginia Convention, Elliot, III. 652.

<sup>3</sup> Madison's letters to Hamilton, Works of Hamilton, I. 462, 468.

The ratification of Virginia took place on the 25th of June; the news of this event was received and published in Philadelphia on the 2d of July. The press of the city was at once filled with rejoicings over the action of Virginia. She was the tenth pillar of the temple of liberty. She was Virginia—eldest and foremost of the states—land of statesmen whose Revolutionary services were as household words in all America—birthplace and home of Washington! We need not wonder, when she had come so tardily, so cautiously, into the support of the Constitution, that men should have hailed her accession with enthusiasm. The people of Philadelphia had been for some time preparing a public demonstration, in honor of the adoption of the Constitution by nine states. Now that Virginia was added to the number, they determined that all possible magnificence and splendor should be given to this celebration, and they chose for it the anniversary day of the National Independence.

A taste for allegory appears to have been quite prevalent among the people of the United States at this period. Accordingly the Philadelphia procession of July 4, 1788, was filled with elaborate and emblematic representations. It was a long pageant of banners, of trades, and devices. A decorated car bore the Constitution framed as a banner and hung upon a staff. Then another decorated car carried the American flag and the flags of all friendly nations. Then followed the judges in their robes, and all the public bodies, preceding a grand federal edifice, which was carried on a carriage drawn by ten horses. On the floor of this edifice were seated, in chairs, ten gentlemen, representing the citizens of the United States at large, to whom the Federal Constitution had been committed before its ratification. When it arrived at "Union Green" they gave up their seats to ten others representing the ten states which had ratified the instrument. The federal ship, *The Union*, came next, followed by all the trades, plying their various crafts upon elevated platforms, with their several emblems and mottoes, strongly expressing confidence in the protection that would be afforded under the Constitution to all the forms of American manufactures and mechanic arts. Ten vessels paraded on the Delaware, each with a broad white flag at its masthead, bearing the name of one of the ten states in gold letters; and, as if to combine the ideas both of the absence and

the presence of the ten states, ten carrier-pigeons were let off from the printers' platform, each with a small package bearing "the ode of the day" to one of the ten rejoicing and sympathizing states.

Thus did ingenuity and mechanical skill exert themselves in quaint devices and exhibitions, to portray, to personify, and to celebrate the vast social consequences of an event which had then no parallel in the history of any other country—the free and voluntary adoption by the people of a written constitution of government framed by the agents and representatives of the people themselves. The carrier-birds are not known to have literally performed their tasks, but as rapidly as horse and man could carry it, the news from Virginia pressed on to the North, and reached Hamilton at Poughkeepsie on the 8th of July.

It found him still surrounded by the same difficulties that existed when he received the result of the Convention of New Hampshire. The opposition had relaxed none of their efforts to prevent the adoption of the Constitution; they had only become somewhat divided respecting the method to be pursued for its defeat. Some of them were in favor of conditions precedent, or previous amendments; some, of conditions subsequent, or the proposal of amendments upon the condition that, if they should not be adopted within a certain time, the state should be at liberty to withdraw from the Union; and all of them were determined, in case the Constitution should be ratified, to carry constructive declarations of its meaning and powers as far as possible. Hamilton was conscious that the chief danger to which the Constitution itself was now exposed was that a general concurrence in injudicious recommendations might seriously wound its power of taxation, by causing a recurrence, in some shape, to the system of requisitions. The danger to which the state of New York was exposed was that it might not become a member of the new Union in any form.

The leading Federalists who were united with Hamilton in the effort to prevent such a disastrous issue of this convention were John Jay, the chancellor, Robert R. Livingston, and James Duane. A few days after the intelligence from New Hampshire was received, these gentlemen held a consultation as to the most effectual method of encountering the objections made to the general power

of taxation that would be conferred by the Constitution upon the general government. The legislative history of the state from 1780 to 1782 embraced a series of official acts and documents showing that the state had been compelled to sustain a very large share of the burden of the Revolutionary war; that requisitions had been unable to call forth the resources of the country; and that, in the judgment of the state, officially and solemnly declared in 1782, and concurred in by those who now resisted the establishment of the Constitution, it was necessary that the Union should possess other sources of revenue. The Federalists now resolved that these documents be formally laid before the convention, and Hamilton undertook to bring them forward.

On the 27th of June he commenced the most elaborate and important of the speeches which he made in this assembly, for the purpose of showing that in the construction of a government the great objects to be attained are a free and pure representation, and a proper balance between the different branches of administration; and that when these are obtained, all the powers necessary to answer, in the most ample manner, the purposes of government, may be bestowed with entire safety. He proceeded to argue, not only that a general power of taxation was essential, but that, under a system so complex as that of the Constitution—so skilfully endowed with the requisite forms of representation and division of executive and legislative power—it was next to impossible that this authority should be abused. In the course of this speech, and for the purpose of showing that the state had suffered great distresses during the war from the mode of raising revenues by requisitions, he called for the reading at the clerk's table of a series of documents exhibiting this fact. Governor Clinton resisted their introduction, but they were read; and Hamilton and his friends then contended that they proved beyond dispute that the state had once been in great peril for want of an energetic general government.

This movement produced a warm altercation between the leading gentlemen on the opposite sides of the house. But while it threw a grave responsibility upon the opposition, it did not conquer them; and by the day on which the intelligence from Virginia arrived, they had heaped amendments upon the table on almost every clause and feature of the Constitution, some one or

more of which it was highly probable they would succeed in making a condition of its acceptance.

This critical situation of affairs led Hamilton to consider, for a short time, whether it might not be necessary to accede to a plan by which the state should reserve the right to recede from the Union, in case its amendments should not have been decided upon, in one of the modes pointed out by the Constitution, within five or six years. He saw the objections to this course; and he was determined to leave no effort untried to bring the opposition to an unqualified ratification. But the danger of a rejection of the Constitution was extreme; and as a choice of evils he thought that, if the state could in the first instance be received into the Union under such a reserved right to withdraw, succeeding events, by the adoption of all proper and necessary amendments, would make the reservation unimportant, because such amendments would satisfy the more reasonable part of the opposition, and would thus break up their party. But he determined not to incur the hazard of this step upon his own judgment alone, or that of any one else having a personal interest in the question; and accordingly, on the 12th of July, he despatched a letter to Madison, who was then attending in Congress at the city of New York, asking his opinion upon the possibility of receiving the state into the Union in this form.<sup>1</sup>

Madison instantly replied that, in his opinion, this would be a conditional ratification, and would not make the state of New York a member of the new Union; that the Constitution required an adoption *in toto* and forever; and that any condition must vitiate the ratification of any state.<sup>2</sup>

Before this reply could have been received at Poughkeepsie, the Federalists had introduced their proposition for an unconditional ratification, and this was followed by that of the Anti-Federalists for a conditional one. The former was rejected by the Convention on the 16th of July. The opposition then brought forward a new form of conditional ratification, with a bill of rights prefixed, and with amendments subjoined. After a long debate the Federalists succeeded, on the 23d of July, in procuring a vote to change this proposition, so that, in place of the words

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<sup>1</sup> Letter to Madison, Works of Hamilton, I. 464.

<sup>2</sup> Ibid., 465.

"on condition," the people of the state would be made to declare that they assented to and ratified the Constitution "in full confidence" that, until a general convention should be called for proposing amendments, Congress would not exercise certain powers which the Constitution conferred upon them. This alteration was carried by thirty-one votes against twenty-seven. A list of amendments was then agreed upon, and a circular letter was adopted, to be sent to all the states, recommending a general convention; and on Saturday, the 26th of July, the ratification, as thus framed, with the bill of rights and the amendments, was carried by thirty affirmative against twenty-seven negative votes.<sup>1</sup>

By this slender majority of her delegates, and under circumstances of extreme peril of an opposite decision, did the state of New York accept the Constitution of the United States, and become a member of the new government. The facts of the case, and the importance of her being brought into the new Union, afford a sufficient vindication of the course pursued by the Federalists in her convention. But it is necessary, before closing the history of these events, to consider a complaint that was made at the time by some of the most zealous of their political associates in other quarters, and which touched the correctness of their motives in assenting to the circular letter demanding a general convention for the amendment of the Constitution.

That there was danger lest another general convention might result in serious injury to the Constitution, perhaps in its overthrow, was a point on which there was probably no difference of opinion among the Federalists of that day. Washington regarded it in this light; and there is no reason to doubt that Hamilton and Jay, and many others of the friends of the Constitution, would have felt great anxiety about its result. But there were some members of the Federal party, in several of the states, who do not seem to have fully appreciated the importance of conceding to the opposition, at the time of the adoption of the Constitution,

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<sup>1</sup> It was reported in the newspapers of that period that the Constitution was adopted in this Convention by 30 yeas against 25 nays. But the official record gives the several votes as they are stated in the text; from which it appears that, on the critical question of a conditional or unconditional ratification, the majority was only 2. In truth, the ratification of New York barely escapes the objection of being a qualified one, if it does in fact escape it.



the use of any and every form of obtaining amendments which the Constitution itself recognized. This was true everywhere, where serious dissatisfaction existed, and it was especially true in the state of New York. It was impossible to procure a ratification in that state without an equivalent concession; and if the Federal leaders in that convention assented to the proposal of a course of amending the Constitution for which the instrument itself provided, however ineligible it might be, their justification is to be found in the circumstances of their situation. Washington himself, when all was over, wrote to Mr. Jay as follows: "Although I could scarcely conceive it possible, after ten states had adopted the Constitution, that New York, separated as it is from the others, and peculiarly divided in sentiments as it is, would withdraw from the Union, yet, considering the great majority which appeared to cling together in the convention, and the decided temper of the leaders, I did not, I confess, see how it was to be avoided. The exertion of those who were able to effect this great work must have been equally arduous and meritorious."<sup>1</sup>

But others were not so just. The Federalists of the New York convention were complained of by some of their friends for having assented to the circular letter for the purpose of procuring a ratification at any price, in order to secure the establishment of the new government at the city of New York. It was said that the state had better have remained out of the Union than to have taken a course which would prove more injurious than her rejection would have done.<sup>2</sup>

With respect to these complaints and the accompanying charge it is only necessary to say, in the first place, that Hamilton and Jay and their associates believed that there was far less danger to be apprehended from a mere call for a second general convention than from a rejection of the Constitution by the state of New York; and they had to choose between these alternatives. The result shows that they chose rightly; for the assembling of a general convention was superseded by the action of Congress upon the amendments proposed by the states. In the second place, the

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<sup>1</sup> Works of Washington, IX. 408.

<sup>2</sup> Madison's letter to Washington, August 24th, 1788, Works of Washington, IX. 549.

alleged motive did not exist. We now know that Hamilton certainly, and we may presume his friends also, did not expect or desire the new government to be more than temporarily placed at the city of New York. He himself saw the impolicy of establishing it permanently either at that place or at Philadelphia. He regarded its temporary establishment at the city of New York as the certain means of carrying it farther south, and of securing its final and permanent place somewhere upon the banks of the Delaware within the limits of New Jersey, or upon the banks of the Potomac within the limits of Virginia.<sup>1</sup>

The people of the city of New York had waited long for the decision of their state convention. They had postponed several times their intended celebration in honor of the Constitution, which, as it was to be the last, they determined should be the most imposing of these ceremonies. When the day at length came, on the 5th of August, 1788, it saw a population whose mutual confidence and joy had absorbed every narrow and bigoted distinction in that noblest of all the passions that a people can exhibit—love of country. It were a vain and invidious task to attempt to determine, from the contemporary descriptions, whether this display exceeded that of all the other cities in variety and extent. But there was one feature of it so striking, so creditable to the people of the city of New York, that it should not be passed over. It consisted in the honors they paid to Hamilton.

He must have experienced on that day the best reward that a statesman can ever find; for there is no purer, no higher pleasure for a conscientious statesman, than to know, by demonstrations of public gratitude, that the humblest of the people for whose welfare he has labored appreciate and are thankful for his services. Public life is often represented, and often found, to be a thankless sphere for men of the greatest capacity and the highest patriotism; and the accidents, the defeats, the changes, the party passions and obstructions of the political world, in a free government, frequently make it so. But mankind are neither deliberately heartless nor systematically unthankful; and it has sometimes happened, in popular governments, that statesmen of the

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<sup>1</sup> See his letter to Governor Livingston of New Jersey, August 29th, 1788, Works, I. 471.

first order of mind and character have, while living, received the most unequivocal proofs of feeling directly from the popular heart, while the sum total of their lives appears in history to be wanting in evidences of that personal success which is attained in a constant triumph over opponents. Such an expression of popular gratitude and sympathy it was now the fortune of Hamilton to receive.

The people of the city did not stop to consider, on this occasion, whether he was entitled, in comparison with all the other public men in the United States, to be regarded as the chief author of the blessings which they now anticipated from the Constitution. And why should they? He was their fellow-citizen—their own. They remembered the day when they saw him, a mere boy, training his artillerymen in their public park for the coming battles of the Revolution. They remembered the youthful eloquence and the more than youthful power with which he encountered the pestilent and slavish doctrines of their tories. They thought of his career in the army, when the extraordinary maturity, depth, and vigor of his genius, and his great accomplishments, supplied to Washington, in some of the most trying periods of his vast and prolonged responsibility, the assistance that Washington most needed. They recollected his career in Congress, when his comprehensive intellect was always alert, to bear the country forward to measures and ideas that would concentrate its powers and resources in some national system. They called to mind how he had kept their own state from wandering quite away into the paths of disunion—how he had enlightened, invigorated, and purified public opinion by his wise and energetic counsels—how he had led them to understand the true happiness and glory of their country—how he had labored to bring about those events which had now produced the Constitution—how he had shown to them the harmony and success that might be predicted of its operation, and had taught them to accept what was good, without petulantly demanding what individual opinion might claim as perfect.

What was it to them, therefore, on this day of public rejoicing, that there might be in his policy more of consolidation than in the policy of others—that he was said to have in his politics too much that was national and too little that was local—that some had done as much as he in the actual construction of the system which they were now to celebrate? Such controversies might be for

history, or for the contests of administration that were soon to arise. On this day they were driven out of men's thoughts by the glow of that public enthusiasm which banishes the spirit of party, and touches and opens the inmost fountains of patriotism. Hamilton had rendered a series of great services to his country, which had culminated in the adoption of the Constitution by the state of New York; and they were now acknowledged from the very hearts of those who best knew his motives and best understood his character.

The people themselves, divided into their respective trades, evidently undertook the demonstrations in his honor, and gave them an emphasis which they could have derived from no other source. They bore his image aloft upon banners. They placed the Constitution in his right hand, and the Confederation in his left. They depicted Fame, with her trumpet, crowning him with laurels. They emblazoned his name upon the miniature frigate, the federal ship of state. They anticipated the administration of the first president, by uniting on the national flag the figure of Washington and the figure of Hamilton.<sup>1</sup> All that ingenuity, all that affection, that popular pride and gratitude could do, to honor a public benefactor, was repeated again and again through the long line of five thousand citizens, of all orders and conditions, which stretched away from the shores of that beautiful bay where ocean ascends into river and river is lost in ocean—where Commerce then wore her holiday attire, to prefigure the magnificence and power which she was to derive from the Constitution of the United States.

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<sup>1</sup> Some of the most elaborate of these devices were borne by the "Block and Pump Makers" and the "Tallow-Chandlers."

## CHAPTER XXXVI.

### ACTION OF NORTH CAROLINA AND RHODE ISLAND.

THUS had eleven states, at the end of July, 1788, unconditionally adopted the Constitution ; five of them proposing amendments for the consideration of the first Congress that would assemble under it, and one of the five calling for a second general convention to act upon the amendments desired. Two other states, however, North Carolina and Rhode Island, still remained aloof.

The legislature of North Carolina, in December, 1787, had ordered a state convention, which assembled July 21, 1788, five days before the convention of New York ratified the Constitution. In this body the Anti-Federalists obtained a large majority. They permitted the whole subject to be debated until the 2d of August; still it had been manifest from the first that they would not allow of an unconditional ratification. They knew what had been the result in New Hampshire and Virginia ; but the decision of New York had, of course, not reached them. Their determination was not, however, to be affected by the certainty that the new government would be organized. Their purpose was not to enter the new Union until the amendments which they desired had been obtained. They assumed that the Congress of the Confederation would not provide for the organization of the new government until another general convention had been held ; or, if they did, that such a convention would be called by the new Congress ; and it appeared to them to be the most effectual mode of bringing about one or the other of these courses to remain for the present in an independent position. The inconvenience and hazard attending such a position do not seem to have had much weight with them, when compared with what they regarded as the danger of an unconditional assent to the Constitution as it then stood.

The Federalists contended strenuously for the course pursued by the other states which had proposed amendments, but they

were overpowered by great numbers, and the convention was dissolved, after adopting a resolution declaring that a bill of rights, and certain amendments, ought to be laid before Congress and the convention that might be called for amending the Constitution, previous to its ratification by the state of North Carolina.<sup>1</sup> But in order, if possible, to place the state in a position to accede to the Constitution at some future time, and to participate fully in its benefits, they also declared that, having thought proper neither to ratify nor to reject it, and as the new Congress would probably lay an impost on goods imported into the states which had adopted it, they recommended the legislature of North Carolina to lay a similar impost on goods imported into the state, and to appropriate the money arising from it to the use of Congress.<sup>2</sup>

The elements which formed the opposition to the Constitution in other states received in Rhode Island an intense development and aggravation from the peculiar spirit of the people and from certain local causes, the history of which has never been fully written, and is now only to be gathered from scattered sources. Constitutional government was exposed to great perils in that day, throughout the country, in consequence of the false notions of state sovereignty and of public liberty which prevailed everywhere. But it seemed as if all these causes of opposition and distrust had centred in Rhode Island, and had there found a theatre on which to exhibit themselves in their worst form. Fortunately this theatre was so small and peculiar as to make the display of these ideas extremely conspicuous.

The colony of Rhode Island was established upon the broadest principles of religious and civil freedom. Its early founders and rulers, flying from religious persecution in the other New England colonies, had transmitted to their descendants a natural jealousy of other communities, and a high spirit of individual and public independence. In the progress of time, as not infrequently happens in such communities, the principles on which the state was founded were falsely interpreted and applied, until, in the minds of a large part of the people, they had come to mean a simple

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<sup>1</sup> This resolution was adopted August 2d, 1788, by 184 yeas to 84 nays. North Carolina Debates, Elliot, IV. 250, 251.

<sup>2</sup> North Carolina Debates, Elliot, IV. 250, 251.

aversion to all but the most democratic form of government. No successful appeal to this hereditary feeling could be made during the early part of the Revolution, against the interests and influence of the Confederacy, because the early and local effect of the Revolution in fact coincided with it. But when the Revolution was fairly accomplished, and the state had assumed its position of absolute sovereignty, what may be called the extreme *individualism* of the people, and their old unfortunate relations with the rest of New England, made them singularly reluctant to part with any power to the confederated states. The manifestations of this feeling we have seen all along, from the first establishment of the Confederation down to the period at which we are now arrived.

The local causes which gave to this tendency its utmost activity, at the time of the formation of the Constitution of the United States, were the following :

First, there had existed in the state, for a considerable period, a despotic and well-organized party, known as the paper-money party. This faction had long controlled the legislation of the state by furnishing the agricultural classes, in the shape of paper money, with the only circulating medium they had ever had in any large quantity ; and they were determined to extinguish the debt of the state by this species of currency, which the legislature could, and did, depreciate at pleasure.

Secondly, there existed, to a great and ludicrous extent, a constant antagonism between town and country—between the agricultural and the mercantile or trading classes ; and this hostility was especially violent and active between the people of the towns of Providence and Newport and the people of the surrounding and the more remote rural districts.<sup>1</sup> The paper-money question divided the inhabitants of the state in the same way. The loss of this circulation would deprive the agricultural classes of their

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<sup>1</sup> The march of the country people upon Providence, on the 4th of July, 1788, and the manner in which they compelled the inhabitants of the town to abandon their purpose of celebrating the adoption of the Constitution by nine states—dictating even their toasts and salutes—reads more like a page in *Diëdrieh Knickerbocker's History of New York* than like anything else. But it is as veracious as well as a most amusing story. See *Staples's Annals of Providence*, pp. 329–335.

sole currency. They kept their paper-money party, therefore, in a state of constant activity ; and when the Constitution of the United States appeared this was an organized and triumphant party, ready for any new contest. Finally, there prevailed among the country party a notion that the maritime advantages of the state ought, in some way, to be made use of for obtaining better terms with the general government than could be had under the Constitution, and that by some such means funds could be obtained for paying their most urgent debts.

If we may judge of the spirit and the acts of the majority of the people of Rhode Island, at this time, by the manner in which they were looked upon throughout the rest of the Union, no language of censure can be too strong to be applied to them. They were regarded and spoken of everywhere, among the Federalists, with contempt and abhorrence. Even the opposition in other states, in all their arguments against the Constitution, never ventured to defend the people of Rhode Island. Ridicule and scorn were heaped upon them from all quarters of the country, and ardent zealots of the Federal press urged the adoption of the advice which they said the grand seignior had given to the king of Spain with respect to the refractory states of Holland, namely, to send his men with shovels and pickaxes, and throw them all into the sea. Such an undertaking, we may suppose, might have proved as difficult on this as it would have been on the other side of the Atlantic. But however this might have been, it is probable that the natural effect of their conduct on the minds of men in other states, and the treatment they received, reacted upon the people of Rhode Island, and made them still more tenacious and persistent in their wrongful course.

But we need not go out of the state itself to find proof that a majority of its people were at this time violent, arbitrary, and unenlightened, both as to their true interests and as to the principles of public honesty. Determined to adhere to their paper-money system, they did not pause to consider and to discuss the great questions respecting the Constitution—its bearing upon the welfare of the states—its effect upon public liberty and social order—the necessity for its amendment in certain particulars—which led, in the conventions of the other states, to some of the most important debates that the subjects of government and free in-



stitutions have ever produced. Indeed, they resolved to stifle all such discussions at once; or, at any rate, to prevent them from being had in an assembly whose proceedings would be known to the world. When the General Assembly received the Constitution, at their session in October, 1787, they directed it to be published and circulated among the inhabitants of the state. In February, 1788, instead of calling a convention, they referred the adoption of the Constitution to the freemen in their several town-meetings, for the purpose of having it rejected. There were at this time a little more than four thousand legal voters in the state. The Federalists, a small minority, indignant at the course of the legislature, generally withdrew from the meetings and refused to vote. The result was that the people of the state appeared to be nearly unanimous in rejecting the Constitution.<sup>1</sup>

The freemen of the towns of Providence and Newport thereupon presented petitions to the General Assembly, complaining of the inconvenience of acting upon the proposed Constitution in meetings in which the people of the seaport towns and the people of the country could not hear and answer each other's arguments, or agree upon the amendments that it might be desirable to propose, and praying for a state convention. Their application was refused, and Rhode Island remained in this position at the time when the question of organizing the new government came before the Congress of the Confederation, in July, 1788.

Better counsels prevailed with her people at a later period, and the same redeeming virtue and good sense were at length triumphant which, in still more recent trials, have enabled her to overcome error and party passion, and the false notions of liberty that have sometimes prevailed within her borders. As the stranger now traverses her little territory, in the journey of less than a day, and beholds her ample enjoyment of all civil and religious blessings—her busy towns, her fruitful fields, her fair seat of learning, crowning her thriving capital, her free, happy, and prosperous people, her noble waters where she sits enthroned upon her lovely isles—and remembers some parts of her history, he cannot fail, in his prayer for her welfare, to breathe the hope that an escape

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<sup>1</sup> There were 2708 votes thrown against it, and 292 in its favor. This occurred in March, 1788.

from great social perils may be found for her and for all of us, in the future, as it has been in the past.

But the attitudes taken by North Carolina and Rhode Island—although in truth quite different and taken from very different motives—placed the Union in a new crisis, involving the Constitution in great danger of being defeated, notwithstanding its adoption by more than nine states. Both of them were members of the existing confederacy; both had a right to vote on all questions coming before the Congress of that confederacy; and it was to this body that the national Convention itself had looked for the initiatory measures necessary to organize the new government under the Constitution. The question whether that government should be organized at all was necessarily involved with the question as to the place where it should be directed to assemble and to exercise its functions. This latter topic had often been a source of dissension between the states; and there was much danger lest the votes of North Carolina and Rhode Island, in the Congress of the Confederation, by being united with the votes of states opposed to the selection of the place that might be named as the seat of the new government, might prevent the Constitution from being established at all.



# A P P E N D I X.

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## IN CONGRESS.

### CIRCULAR LETTER OF CONGRESS RECOMMENDING THE ADOPTION OF THE ARTICLES OF CONFEDERATION.

IN CONGRESS, YORKTOWN, *November 17th, 1777.*

Congress having agreed upon a plan of confederacy for securing the freedom, sovereignty, and independence of the United States, authentic copies are now transmitted for the consideration of the respective legislatures.

This business, equally intricate and important, has in its progress been attended with uncommon embarrassments and delay, which the most anxious solicitude and persevering diligence could not prevent. To form a permanent union, accommodated to the opinion and wishes of the delegates of so many states differing in habits, produce, commerce, and internal police, was found to be a work which nothing but time and reflection, conspiring with a disposition to conciliate, could mature and accomplish.

Hardly is it to be expected that any plan, in the variety of provisions essential to our union, should exactly correspond with the maxims and political views of every particular state. Let it be remarked that, after the most careful inquiry and the fullest information, this is proposed as the best which could be adapted to the circumstances of all, and as that alone which affords any tolerable prospect of general satisfaction.

Permit us, then, earnestly to recommend these articles to the immediate and dispassionate attention of the legislatures of the respective states. Let them be candidly reviewed, under a sense of the difficulty of combining in one general system the various sentiments and interests of a continent divided into so many sovereign and independent communities, under a conviction of the absolute necessity of uniting all our counsels and all our strength to maintain and defend our common liberties; let them be examined with a liberality becoming brethren and fellow-citizens surrounded by the same imminent dangers, contending for the same illustrious prize, and deeply interested in being forever bound and connected together by ties the most intimate and indissoluble; and, finally, let them be adjusted with the temper and magnanimity of wise and patriotic

legislators who, while they are concerned for the prosperity of their own more immediate circle, are capable of rising superior to local attachments when they may be incompatible with the safety, happiness, and glory of the general confederacy.

We have reason to regret the time which has elapsed in preparing this plan for consideration; with additional solicitude we look forward to that which must be necessarily spent before it can be ratified. Every motive loudly calls upon us to hasten its conclusion.

More than any other consideration, it will confound our foreign enemies, defeat the flagitious practices of the disaffected, strengthen and confirm our friends, support our public credit, restore the value of our money, enable us to maintain our fleets and armies, and add weight and respect to our counsels at home and to our treaties abroad.

In short, this salutary measure can no longer be deferred. It seems essential to our very existence as a free people, and without it we may feel constrained to bid adieu to independence, to liberty and safety—blessings which, from the justice of our cause and the favor of our Almighty Creator visibly manifested in our protection, we have reason to expect, if, in an humble dependence on his divine providence, we strenuously exert the means which are placed in our power.

To conclude, if the legislature of any state shall not be assembled, Congress recommend to the executive authority to convene it without delay; and to each respective legislature it is recommended to invest its delegates with competent powers ultimately, in the name and behalf of the state, to subscribe Articles of Confederation and Perpetual Union of the United States; and to attend Congress for that purpose on or before the tenth day of March next.

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## NEW JERSEY.

### REPRESENTATION OF THE STATE OF NEW JERSEY ON THE ARTICLES OF CONFEDERATION, READ IN CONGRESS, JUNE 25TH, 1778.

*To the United States in Congress assembled: The Representation of the Legislative Council and General Assembly of the State of New Jersey sheweth:*

That the Articles of Confederation and Perpetual Union between the states of New Hampshire, Massachusetts Bay, Rhode Island and Providence Plantations, Connecticut, New York, New Jersey, Pennsylvania, Delaware, Maryland, Virginia, North Carolina, South Carolina, and Georgia, proposed by the honorable the Congress of the said states, severally for their consideration, have been by us fully and attentively considered; on which we beg leave to remark as follows:

1. In the fifth article, where, among other things, the qualifications of the delegates from the several states are described, there is no mention of any oath,

test, or declaration, to be taken or made by them previous to their admission to seats in Congress. It is, indeed, to be presumed the respective states will be careful that the delegates they send to assist in managing the general interest of the Union take the oaths to the government from which they derive their authority; but as the United States, collectively considered, have interests, as well as each particular state, we are of opinion that some test or obligation binding upon each delegate while he continues in the trust, to consult and pursue the former as well as the latter, and particularly to assent to no vote or proceeding which may violate the general confederation, is necessary. The laws and usages of all civilized nations evince the propriety of an oath on such occasions; and the more solemn and important the deposit, the more strong and explicit ought the obligation to be.

2. By the sixth and ninth articles the regulation of trade seems to be committed to the several states within their separate jurisdictions, in such a degree as may involve many difficulties and embarrassments, and be attended with injustice to some states in the Union. We are of opinion that the sole and exclusive power of regulating the trade of the United States with foreign nations ought to be clearly vested in the Congress; and that the revenue arising from all duties and customs imposed thereon ought to be appropriated to the building, equipping, and manning a navy for the protection of the trade and defence of the coasts, and to such other public and general purposes as to the Congress shall seem proper, and for the common benefit of the states. This principle appears to us to be just, and it may be added that a great security will by this means be derived to the Union from the establishment of a common and mutual interest.

3. It is wisely provided, in the sixth article, that no body of forces shall be kept up by any state in time of peace, except such number only as, in the judgment of the United States in Congress assembled, shall be deemed requisite to garrison the forts necessary for the defence of such states. We think it ought also to be provided and clearly expressed, that no body of troops be kept up by the United States in time of peace, except such number only as shall be allowed by the assent of the nine states. A standing army, a military establishment, and every appendage thereof, in time of peace, is totally abhorrent from the ideas and principles of this state. In the memorable act of Congress declaring the United Colonies free and independent states, it is emphatically mentioned, as one of the causes of separation from Great Britain, that the sovereign thereof had kept up among us, in time of peace, standing armies without the consent of the legislatures. It is to be wished the liberties and happiness of the people may, by the Confederation, be carefully and explicitly guarded in this respect.

4. On the eighth article we observe that, as frequent settlements of the quotas for supplies and aids to be furnished by the several states in support of the general treasury will be requisite, so they ought to be secured. It cannot be thought improper, or unnecessary, to have them struck once at least in every five years, and oftener if circumstances will allow. The quantity or value of real property in some states may increase much more rapidly than in others; and, therefore, the quota which is at one time just will at another be disproportionate.

5. The boundaries and limits of each state ought to be fully and finally fixed and made known. This we apprehend would be attended with very salutary effects, by preventing jealousies, as well as controversies, and promoting harmony and confidence among the states. If the circumstances of the times would not admit of this, previous to the proposal of the Confederation to the several states, the establishment of the principles upon which and the rule and mode by which the determination might be conducted at a time more convenient and favorable for despatching the same at an early period, not exceeding five years from the final ratification of the Confederation, would be satisfactory.

6. The ninth article provides that no state shall be deprived of territory for the benefit of the United States. Whether we are to understand that by territory is intended any land, the property of which was heretofore vested in the crown of Great Britain, or that no mention of such land is made in the Confederation, we are constrained to observe that the present war, as we always apprehended, was undertaken for the general defence and interest of the confederating colonies, now the United States. It was ever the confident expectation of this state that the benefits derived from a successful contest were to be general and proportionate; and that the property of the common enemy, falling in consequence of a prosperous issue of the war, would belong to the United States, and be appropriated to their use. We are, therefore, greatly disappointed in finding no provision made in the Confederation for empowering the Congress to dispose of such property, but especially the vacant and im patented lands, commonly called the crown lands, for defraying the expenses of the war, and for such other public and general purposes. The jurisdiction ought in every instance to belong to the respective states within the charter or determined limits of which such lands may be seated; but reason and justice must decide that the property which existed in the crown of Great Britain, previous to the present Revolution, ought now to belong to the Congress, in trust for the use and benefit of the United States. They have fought and bled for it in proportion to their respective abilities; and therefore the reward ought not to be predilectionally distributed. Shall such states as are shut out by situation from availing themselves of the least advantage from this quarter be left to sink under an enormous debt, whilst others are enabled, in a short period, to replace all their expenditures from the hard earnings of the whole confederacy?

7. The ninth article also provides that requisitions for the land forces to be furnished by the several states shall be proportioned to the number of *white* inhabitants in each. In the act of Independence we find the following declaration: "We hold these truths to be self-evident, that all men are created equal; that they are endued by their Creator with certain unalienable rights, among which are life, liberty, and the pursuit of happiness." Of this doctrine it is not a very remote consequence that all the inhabitants of every society, be the color of their complexion what it may, are bound to promote the interest thereof, according to their respective abilities. They ought, therefore, to be brought into the account on this occasion. But admitting necessity or expediency to justify the refusal of liberty in certain circumstances to persons of a peculiar

color, we think it unequal to reckon upon such in this case. Should it be improper, for special local reasons, to admit them in arms for the defence of the nation, yet we conceive the proportion of forces to be embodied ought to be fixed according to the whole number of inhabitants in the state, from whatever class they may be raised. If the whole number of inhabitants in a state, whose inhabitants are all whites, both those who are called into the field and those who remain to till the ground and labor in the mechanical arts and otherwise, are reckoned in the estimate for striking the proportion of forces to be furnished by that state, ought even a part of the latter description to be left out in another? As it is of indispensable necessity in every war that a part of the inhabitants be employed for the uses of husbandry and otherwise at home, while others are called into the field, there must be the same propriety that the owners of a different color who are employed for this purpose in one state, while whites are employed for the same purpose in another, be reckoned in the account of the inhabitants in the present instance.

8. In order that the quota of troops to be furnished in each state on occasion of a war may be equitably ascertained, we are of opinion that the inhabitants of the several states ought to be numbered as frequently as the nature of the case will admit, once at least every five years. The disproportioned increase in the population of different states may render such provisions absolutely necessary.

9. It is provided in the ninth article that the assent of nine states out of the thirteen shall be necessary to determine in sundry cases of the highest concern. If this proportion be proper and just, it ought to be kept up, should the states increase in number, and a declaration thereof be made for the satisfaction of the Union.

That we think it our indispensable duty to solicit the attention of Congress to these considerations and remarks, and to request that the purport and meaning of them be adopted as part of the general confederation; by which means we apprehend the mutual interest of all the states will be better secured and promoted, and that the legislature of this state will then be justified in ratifying the same.

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ACT OF NEW JERSEY ACCEPTING THE CONFEDERATION, PASSED NOVEMBER 19TH, 1778.

*An Act to authorize and empower the Delegates of the State of New Jersey in Congress to subscribe and ratify the Articles of Confederation and Perpetual Union between the several States.*

Whereas, Articles of Confederation and Perpetual Union between the states of New Hampshire, Massachusetts Bay, Rhode Island and Providence Plantations, Connecticut, New York, New Jersey, Pennsylvania, Delaware, Maryland, Virginia, North Carolina, South Carolina, and Georgia, signed in the Congress of the said states by the Honorable Henry Laurens, Esquire, their President,



have been laid before the legislature of this state, to be ratified by the same, if approved : And whereas, notwithstanding the terms of the said Articles of Confederation and Perpetual Union are considered as in divers respects unequal and disadvantageous to this state, and the objections to several of the said articles, lately stated and sent to the general Congress aforesaid on the part of this state, are still viewed as just and reasonable, and sundry of them as of the most essential moment to the welfare and happiness of the good people thereof : Yet, under the full conviction of the present necessity of acceding to the confederacy proposed, and that every separate and detached state interest ought to be postponed to the general good of the Union : And moreover, in firm reliance that the candor and justice of the several states will, in due time, remove as far as possible the inequality which now subsists :

SECT. 1. Be it enacted by the Council and General Assembly of this state, and it is hereby enacted by the authority of the same, That the Honorable John Witherspoon, Abraham Clark, Nathaniel Scudder, and Elias Boudinot, Esquires, delegates representing this state in the Congress of the United States, or any one or more of them, be and they are hereby authorized, empowered, and directed, on behalf of this state, to subscribe and ratify the said Articles of Confederation and Perpetual Union between the states aforesaid.

SECT. 2. And be it further enacted by the authority aforesaid, That the said Articles of Confederation and Perpetual Union, so as aforesaid subscribed and ratified, shall thenceforth become conclusive as to this state, and obligatory thereon.

## DELAWARE.

RESOLUTIONS PASSED BY THE COUNCIL OF THE STATE OF DELAWARE, JANUARY 23D, 1779, RESPECTING THE ARTICLES OF CONFEDERATION AND PERPETUAL UNION, AND CONCURRED IN BY THE HOUSE OF ASSEMBLY, JANUARY 28TH, 1779, PREVIOUS TO THEIR PASSING A LAW TO EMPOWER THEIR DELEGATES TO SIGN AND RATIFY THE SAID ARTICLES OF CONFEDERATION AND PERPETUAL UNION.

*Resolved*, That the paper laid before Congress by the delegate from Delaware, and read, be filed; provided, that it shall never be considered as admitting any claim by the same set up or intended to be set up.

The paper is as follows, viz. :

IN THE COUNCIL, *Saturday, January 23d, 1779.*

The Council, having resumed the consideration of the committee's report on the Articles of Confederation and Perpetual Union, etc., came to the following resolutions therein :

*Resolved*, That this state think it necessary for the peace and safety of the

states to be included in the Union, that a moderate extent of limits should be assigned for such of those states as claim to the Mississippi or South Sea; and that the United States in Congress assembled should and ought to have the power of fixing their western limits.

*Resolved also*, That this state consider themselves justly entitled to a right, in common with the members of the Union, to that extensive tract of country which lies to the westward of the frontiers of the United States, the property of which was not vested in, or granted to, individuals at the commencement of the present war: That the same hath been, or may be, gained from the king of Great Britain, or the native Indians, by the blood and treasure of all, and ought therefore to be a common estate, to be granted out on terms beneficial to the United States.

*Resolved also*, That the courts of law established within this state are competent for the purpose of determining all controversies concerning the private right of soil claimed within the same; and they now, and at all times hereafter, ought to have cognizance of all such controversies: That the indeterminate provision, in the ninth article of the Confederation, for deciding upon controversies that may arise about some of those private rights of soil, tends to take away such cognizance, and is contrary to the declaration of rights of this state; and therefore ought to receive an alteration.

The Council, then, taking into consideration the strong and earnest recommendations of Congress forthwith to accede to the present plan of confederacy, and the probable disadvantages that may attend the further delaying a ratification thereof,

*Resolved*, That, notwithstanding the terms of the Articles of Confederation aforesaid are considered as in divers respects unequal and disadvantageous to this state, and the objections in the report of the committee of this house, and the resolves made thereon, are viewed as just and reasonable, and of great moment to the welfare and happiness of the good people thereof; yet, under the full conviction of the present necessity of acceding to the confederacy proposed, and in firm reliance that the candor and justice of the several states will in due time remove as far as possible the objectionable parts thereof, the delegates appointed to represent this state in Congress, or any one or more of them, be authorized, empowered, and directed, on behalf of this state, to subscribe and ratify the said Articles of Confederation and Perpetual Union between the several states of New Hampshire, Massachusetts Bay, Rhode Island and Providence Plantations, Connecticut, New York, New Jersey, Pennsylvania, Delaware, Maryland, Virginia, North Carolina, South Carolina, and Georgia; and that the said articles, when so subscribed and ratified, shall be obligatory on this state.

Extract from the Minutes.

BENJAMIN VINING, *Clerk of the Council*.

Sent for concurrence.

IN HOUSE OF ASSEMBLY, *Thursday, January 28th, 1779.*

The foregoing resolutions being read three times, and considered, are concurred in.

NICHOLAS VAN DYKE, *Speaker*.

THURSDAY, FEBRUARY 16TH, 1779.

Mr. M'Kean, a delegate for Delaware, laid before Congress the following instrument, empowering the delegates of that state, or any of them, to ratify and sign the Articles of Confederation.

His Excellency Cesar Rodney, Esquire, President, Captain-General, and Commander-in-Chief of the Delaware State, to all to whom these Presents shall come.—Greeting.

Know ye, That, among the records remaining in the rolls office in the Delaware State, there is a certain instrument of writing, purporting to be an act of the General Assembly of the said state, which said act is contained in the words and tenor here following, to wit :

IN THE YEAR 1779.

*An Act to authorize and empower the Delegates of the Delaware State to subscribe and ratify the Articles of Confederation and Perpetual Union between the several States.*

Whereas Articles of Confederation and Perpetual Union between the states of New Hampshire, Massachusetts Bay, Rhode Island and Providence Plantations, Connecticut, New York, New Jersey, Pennsylvania, Delaware, Maryland, Virginia, North Carolina, South Carolina, and Georgia, signed in the general Congress of the said states by the Honorable Henry Laurens, Esquire, their then President, have been laid before the legislature of this state, to be ratified by the same, if approved : And whereas, notwithstanding the terms of the Articles of Confederation and Perpetual Union are considered as in divers respects unequal and disadvantageous to this state ; and the objections stated on the part of this state are viewed as just and reasonable, and of great moment to the welfare and happiness of the good people thereof ; yet, under the full conviction of the present necessity of acceding to the present confederacy proposed, and that the interest of particular states ought to be postponed to the general good of the Union ; and, moreover, in firm reliance that the candor and justice of the several states will in due time remove as far as possible the objectionable parts thereof :

Be it enacted by the General Assembly of Delaware, and it is hereby enacted by the authority of the same, That the Honorable John Dickinson, Nicholas Van Dyke, and Thomas M'Kean, Esquires, delegates appointed to represent this state in Congress, or any one or more of them, be, and they hereby are, authorized, empowered, and directed, on behalf of this state, to subscribe and ratify the said Articles of Confederation and Perpetual Union between the several states aforesaid.

And be it further enacted by the authority aforesaid, That the said Articles

of Confederation and Perpetual Union, so as aforesaid subscribed and ratified, shall henceforth become obligatory on this state.

Signed by order of the House of Assembly.

NICHOLAS VAN DYKE, *Speaker*.

Signed by order of the Council.

THOMAS COLLINS, *Speaker*.

Passed at Dover, February 1st, 1779.

All which, by the tenor of these presents, I have caused to be exemplified.

In testimony whereof, the great seal of the Delaware State is hereunto affixed, at Dover, the sixth day of February, in the year of our Lord one thousand seven hundred and seventy-nine, and in the third year of the Independence of the United States of America.

CESAR RODNEY.

By his Excellency's command.

JAMES BOOTH, *Secretary*.

## MARYLAND.

FRIDAY, MAY 21ST, 1779.

The delegates of Maryland informed Congress that they have received instructions respecting the Articles of Confederation, which they are directed to lay before Congress, and have entered on their Journals. The instructions, being read, are as follows:

*Instructions of the General Assembly of Maryland, to George Plater, William Paca, William Carmichael, John Henry, James Forbes, and Daniel of St. Thomas Jenifer, Esquires.*

GENTLEMEN,—Having conferred upon you a trust of the highest nature, it is evident we place great confidence in your integrity, abilities, and zeal to promote the general welfare of the United States, and the particular interest of this state, where the latter is not incompatible with the former; but to add greater weight to your proceedings in Congress, and take away all suspicion that the opinions you there deliver and the votes you give may be the mere opinions of individuals, and not resulting from your knowledge of the sense and deliberate judgment of the state you represent, we think it our duty to instruct as followeth on the subject of the Confederation—a subject in which, unfortunately, a supposed difference of interest has produced an almost equal division of sentiments among the several states composing the Union. We say a supposed difference of interests; for if local attachments and prejudices, and the avarice and ambition of individuals, would give way to the dictates of a sound policy, founded on the principles of justice (and no other policy but what is founded on those immutable principles deserves to be called sound), we flatter ourselves this apparent diversity of interests would soon vanish, and all the states would confederate on terms mutually advantageous to all; for they would then perceive

that no other confederation than one so formed can be lasting. Although the pressure of immediate calamities, the dread of their continuance from the appearance of disunion, and some other peculiar circumstances, may have induced some states to accede to the present Confederation, contrary to their own interests and judgments, it requires no great share of foresight to predict that, when those causes cease to operate, the states which have thus acceded to the Confederation will consider it as no longer binding, and will eagerly embrace the first occasion of asserting their just rights, and securing their independence. Is it possible that those states who are ambitiously grasping at territories to which, in our judgment, they have not the least shadow of exclusive right, will use with greater moderation the increase of wealth and power derived from those territories, when acquired, than what they have displayed in their endeavors to acquire them? We think not. We are convinced the same spirit which hath prompted them to insist on a claim so extravagant, so repugnant to every principle of justice, so incompatible with the general welfare of all the states, will urge them on to add oppression to injustice. If they should not be incited by a superiority of wealth and strength to oppress by open force their less wealthy and less powerful neighbors, yet depopulation, and consequently the impoverishment, of those states will necessarily follow, which, by an unfair construction of the Confederation, may be stripped of a common interest, and the common benefits derivable from the Western country. Suppose, for instance, Virginia indisputably possessed of the extensive and fertile country to which she has set up a claim, what would be the probable consequences to Maryland of such an undisturbed and undisputed possession? They cannot escape the least discerning.

Virginia, by selling on the most moderate terms a small proportion of the lands in question, would draw into her treasury vast sums of money; and in proportion to the sums arising from such sales would be enabled to lessen her taxes. Lands comparatively cheap, and taxes comparatively low, with the lands and taxes of an adjacent state, would quickly drain the state thus disadvantageously circumstanced of its most useful inhabitants; its wealth and its consequence in the scale of the confederated states would sink of course. A claim so injurious to more than one half, if not to the whole, of the United States, ought to be supported by the clearest evidence of the right. Yet what evidences of that right have been produced? What arguments alleged in support either of the evidences or the right? None that we have heard of deserving a serious refutation.

It has been said that some of the delegates of a neighboring state have declared their opinion of the practicability of governing the extensive dominion claimed by that state. Hence also the necessity was admitted of dividing its territory, and erecting a new state under the auspices and direction of the elder, from whom no doubt it would receive its form of government, to whom it would be bound by some alliance or confederacy, and by whose councils it would be influenced. Such a measure, if ever attempted, would certainly be opposed by the other states as inconsistent with the letter and spirit of the proposed Con-

federation. Should it take place by establishing a sub-confederacy, *imperium in imperio*, the state possessed of this extensive dominion must then either submit to all the inconveniences of an overgrown and unwieldy government, or suffer the authority of Congress to interpose at a future time, and to lop off a part of its territory, to be erected into a new and free state, and admitted into a confederation on such conditions as shall be settled by nine states. If it is necessary for the happiness and tranquillity of a state thus overgrown that Congress should hereafter interfere and divide its territory, why is the claim to that territory now made, and so pertinaciously insisted on? We can suggest to ourselves but two motives: either the declaration of relinquishing at some future period a proportion of the country now contended for was made to lull suspicion asleep, and to cover the designs of a secret ambition, or, if the thought was seriously entertained, the lands are now claimed to reap an immediate profit from the sale. We are convinced, policy and justice require, that a country unsettled at the commencement of this war, claimed by the British crown, and ceded to it by the treaty of Paris, if wrested from the common enemy by the blood and treasure of the thirteen states, should be considered as a common property, subject to be parcelled out by Congress into free, convenient, and independent governments, in such manner and at such times as the wisdom of that assembly shall hereafter direct.

Thus convinced, we should betray the trust reposed in us by our constituents, were we to authorize you to ratify, on their behalf, the Confederation, unless it be further explained. We have coolly and dispassionately considered the subject; we have weighed probable inconveniences and hardships against the sacrifice of just and essential rights; and do instruct you not to agree to the Confederation, unless an article or articles be added thereto in conformity with our declaration. Should we succeed in obtaining such article or articles, then you are hereby fully empowered to accede to the Confederation.

That these our sentiments respecting our Confederation may be more publicly known, and more explicitly and concisely declared, we have drawn up the annexed declaration, which we instruct you to lay before Congress, to have it printed, and to deliver to each of the delegates of the other states in Congress assembled copies thereof, signed by yourselves, or by such of you as may be present at the time of delivery; to the intent and purpose that the copies aforesaid may be communicated to our brethren of the United States, and the contents of the said declaration taken into their serious and candid consideration.

Also we desire and instruct you to move, at a proper time, that these instructions be read to Congress by their Secretary, and entered on the Journals of Congress.

We have spoken with freedom, as became freemen; and we sincerely wish that these our representations may make such an impression on that assembly as to induce them to make such addition to the Articles of Confederation as may bring about a permanent union.

A true copy from the proceeding of December 15th, 1778.

Test,

T. DUCKETT, C. H. D.

## IN CONGRESS.

SATURDAY, APRIL 1ST, 1780.

The committee to whom was referred the act of the legislature of the State of New York, entitled, "An Act to facilitate the completion of the Articles of Confederation and Perpetual Union among the United States of America," report,

That, having met on the business, but not being able to agree to any resolution thereon, desire to be discharged; which act is in the words following, viz.:

*An Act to facilitate the Completion of the Articles of Confederation and Perpetual Union among the United States of America.*

Whereas nothing under Divine Providence can more effectually contribute to the tranquillity and safety of the United States of America than a federal alliance, on such liberal principles as will give satisfaction to its respective members: And whereas the Articles of Confederation and Perpetual Union recommended by the honorable the Congress of the United States of America have not proved acceptable to all the states, it having been conceived that a portion of the waste and uncultivated territory, within the limits or claim of certain states, ought to be appropriated as a common fund for the expenses of the war: And the people of the State of New York being on all occasions disposed to manifest their regard for their sister states, and their earnest desire to promote the general interest and security; and more especially to accelerate the federal alliance, by removing, as far as it depends upon them, the before-mentioned impediment to its final accomplishment:

Be it therefore enacted, by the people of the State of New York, represented in Senate and Assembly, and it is hereby enacted by the authority of the same, That it shall and may be lawful to and for the delegates of this state, in the honorable Congress of the United States of America, or the major part of such of them as shall be assembled in Congress, and they the said delegates, or a major part of them, so assembled, are hereby fully authorized and empowered, for and on behalf of this state, and by proper and authentic acts or instruments, to limit and restrict the boundaries of this state, in the western parts thereof, by such line or lines, and in such manner and form, as they shall judge to be expedient, either with respect to the jurisdiction as well as the right or pre-emption of soil, or reserving the jurisdiction in part, or in the whole, over the lands which may be ceded, or relinquished, with respect only to the right or pre-emption of the soil.

And be it further enacted by the authority aforesaid, That the territory which may be ceded or relinquished by virtue of this act, either with respect to the jurisdiction as well as the right or pre-emption of soil, or the right or pre-emption

of soil only, shall be and enure for the use and benefit of such of the United States as shall become members of the federal alliance of the said states, and for no other use or purpose whatever.

And be it further enacted by the authority aforesaid, That all the lands to be ceded and relinquished by virtue of this act, for the benefit of the United States, with respect to property, but which shall nevertheless remain under the jurisdiction of this state, shall be disposed of and appropriated in such manner only as the Congress of the said states shall direct; and that a warrant under the authority of Congress for surveying and laying out any part thereof shall entitle the party in whose favor it shall issue to cause the same to be surveyed and laid out and returned according to the directions of such warrant; and thereupon letters patent under the great seal of this state shall pass to the grantee for the estate specified in the said warrant; for which no other fee or reward shall be demanded or received than such as shall be allowed by Congress.

Provided always, and be it further enacted by the authority aforesaid, That the trust reposed by virtue of this act shall not be executed by the delegates of this state, unless at least three of the said delegates shall be present in Congress.

*State of New York, ss.*

I do hereby certify that the foregoing is a true copy of the original act, passed the 19th of February, 1780, and lodged in the Secretary's office.

ROBERT HARPUR, *D'y Sec'y State.*

WEDNESDAY, SEPTEMBER 6TH, 1780.

Congress took into consideration the report of the committee to whom were referred the instructions of the General Assembly of Maryland to their delegates in Congress respecting the Articles of Confederation, and the declaration therein referred to; the act of the legislature of New York on the same subject; and the remonstrance of the General Assembly of Virginia, which report was agreed to, and is in the words following:

That, having duly considered the several matters to them submitted, they conceive it unnecessary to examine into the merits or policy of the instructions or declaration of the General Assembly of Maryland, or of the remonstrances of the General Assembly of Virginia, as they involve questions a discussion of which was declined, on mature consideration, when the Articles of Confederation were debated; nor, in the opinion of the committee, can such questions be now revived with any prospect of conciliation: That it appears more advisable to press upon these states which can remove the embarrassments respecting the Western country a liberal surrender of a portion of their territorial claims, since they cannot be preserved entire without endangering the stability of the general confederacy; to remind them how indispensably necessary it is to establish the Federal Union on a fixed and permanent basis, and on principles acceptable to all its respective



members; how essential to public credit and confidence, to the support of our army, to the vigor of our councils, and success of our measures, to our tranquillity at home, our reputation abroad, to our very existence as a free, sovereign, and independent people; that we are fully persuaded the wisdom of the respective legislatures will lead them to a full and impartial consideration of a subject so interesting to the United States, and so necessary to the happy establishment of the Federal Union; that they are confirmed in these expectations by a view of the before-mentioned act of the legislature of New York, submitted to their consideration; that this act is expressly calculated to accelerate the federal alliance, by removing, as far as depends on that state, the impediment arising from the Western country, and for that purpose to yield up a portion of territorial claim for the general benefit.

Whereupon,

*Resolved*, That copies of the several papers referred to the committee be transmitted, with a copy of the report, to the legislatures of the several states; and that it be earnestly recommended to these states who have claims to the western country to pass such laws, and give their delegates in Congress such powers, as may effectually remove the only obstacle to a final ratification of the Articles of Confederation; and that the legislature of Maryland be earnestly requested to authorize their delegates in Congress to subscribe the said articles.

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## MARYLAND.

MONDAY, FEBRUARY 12TH, 1781.

The delegates of Maryland laid before Congress a certified copy of an act of the legislature of that state, which was read, as follows:

*An Act to empower the Delegates of this State in Congress to subscribe and ratify the Articles of Confederation.*

Whereas it hath been said that the common enemy is encouraged, by this state not acceding to the Confederation, to hope that the union of the sister states may be dissolved; and therefore prosecute the war in expectation of an event so disgraceful to America; and our friends and illustrious ally are impressed with an idea that the common cause would be promoted by our formally acceding to the Confederation: This General Assembly, conscious that this state hath from the commencement of the war strenuously exerted herself in the common cause, and fully satisfied that, if no formal confederation was to take place, it is the fixed determination of this state to continue her exertions to the utmost, agreeable to the faith pledged in the Union—from an earnest desire to conciliate the affections of the sister states, to convince all the world of our unalterable resolution to support the independence of the United States, and the alliance

with his most Christian Majesty; and to destroy forever any apprehension of our friends, or hope in our enemies, of this state being again united to Great Britain :

Be it enacted by the General Assembly of Maryland, That the delegates of this state in Congress, or any two or three of them, shall be, and are hereby, empowered and required, on behalf of this state, to subscribe the Articles of Confederation and Perpetual Union between the states of New Hampshire, Massachusetts Bay, Rhode Island and Providence Plantations, Connecticut, New York, New Jersey, Pennsylvania, Delaware, Maryland, Virginia, North Carolina, South Carolina, and Georgia, signed in the general Congress of the said states by the Honorable Henry Laurens, Esquire, their then President, and laid before the legislature of this state to be ratified, if approved; and that the said Articles of Confederation and Perpetual Union, so as aforesaid subscribed, shall thenceforth be ratified and become conclusive as to this state, and obligatory thereon.

And it is hereby declared, that, by acceding to the said Confederation, this state doth not relinquish, or intend to relinquish, any right or interest she hath with the other united or confederated states to the back country; but claims the same as fully as was done by the legislature of this state in their declaration which stands entered on the journals of Congress: this state relying on the justice of the several states hereafter, as to the said claim made by this state.

And it is further declared, That no article in the said Confederation can or ought to bind this or any other state to guarantee any exclusive claim of any particular state to the soil of the said back lands, or any such claim of jurisdiction over the said lands, or the inhabitants thereof.

By the House of Delegates, January 30th, 1781.

Read and assented to.

By order,

F. GREEN, *Clerk.*

By the Senate, February 2, 1781.

Read and assented to.

By order,

JAS. MACCUBBIN, *Clerk.*

THOMAS LEE. [L. S.]

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## ARTICLES OF CONFEDERATION AND PERPETUAL UNION

BETWEEN THE STATES OF NEW HAMPSHIRE, MASSACHUSETTS BAY, RHODE ISLAND AND PROVIDENCE PLANTATIONS, CONNECTICUT, NEW YORK, NEW JERSEY, PENNSYLVANIA, DELAWARE, MARYLAND, VIRGINIA, NORTH CAROLINA, SOUTH CAROLINA, AND GEORGIA.

ART. 1. The style of this Confederacy shall be "The United States of America."

ART. 2. Each state retains its sovereignty, freedom, and independence, and every power, jurisdiction, and right which is not by this Confederation expressly delegated to the United States in Congress assembled.

**ART. 3.** The said states hereby severally enter into a firm league of friendship with each other for their common defence, the security of their liberties, and their mutual and general welfare; binding themselves to assist each other against all force offered to or attacks made upon them on account of religion, sovereignty, trade, or any other pretence whatever.

**ART. 4.** The better to secure and perpetuate mutual friendship and intercourse among the people of the different states in this Union, the free inhabitants of each of these states (paupers, vagabonds, and fugitives from justice excepted) shall be entitled to all privileges and immunities of free citizens in the several states; and the people of each state shall have free ingress and regress to and from any other state, and shall enjoy therein all the privileges of trade and commerce, subject to the same duties, impositions, and restrictions as the inhabitants thereof respectively, provided that such restriction shall not extend so far as to prevent the removal of property imported into any state to any other state, of which the owner is an inhabitant; provided also, that no imposition, duties, or restriction shall be laid by any state on the property of the United States, or either of them.

If any person guilty of or charged with treason, felony, or other high misdemeanor in any state, shall flee from justice and be found in any of the United States, he shall, upon demand of the governor or executive power of the state from which he fled, be delivered up and removed to the state having jurisdiction of his offence.

Full faith and credit shall be given in each of these states to the records, acts, and judicial proceedings of the courts and magistrates of every other state.

**ART. 5.** For the more convenient management of the general interests of the United States, delegates shall be annually appointed, in such manner as the legislature of each state shall direct, to meet in Congress on the first Monday in November, in every year, with a power reserved to each state to recall its delegates, or any of them, at any time within the year, and to send others in their stead, for the remainder of the year.

No state shall be represented in Congress by less than two nor by more than seven members; and no person shall be capable of being a delegate for more than three years in any term of six years; nor shall any person, being a delegate, be capable of holding any office under the United States, for which he, or any other for his benefit, receives any salary, fees, or emolument of any kind.

Each state shall maintain its own delegates in any meeting of the states, and while they act as members of the committee of the states.

In determining questions in the United States in Congress assembled, each state shall have one vote.

Freedom of speech and debate in Congress shall not be impeached or questioned in any court or place out of Congress; and the members of Congress shall be protected in their persons from arrests and imprisonments, during the time of their going to and from and attendance on Congress, except for treason, felony, or breach of the peace.

**ART. 6.** No state, without the consent of the United States in Congress assembled, shall send any embassy to, or receive any embassy from, or enter into

any conference, agreement, alliance, or treaty with any king, prince, or state; nor shall any person holding any office of profit or trust under the United States, or any of them, accept of any present, emolument, office, or title of any kind whatever from any king, prince, or foreign state; nor shall the United States in Congress assembled, or any of them, grant any title of nobility.

No two or more states shall enter into any treaty, confederation, or alliance whatever between them, without the consent of the United States in Congress assembled, specifying accurately the purposes for which the same is to be entered into, and how long it shall continue.

No state shall lay any imposts or duties which may interfere with any stipulations in treaties entered into by the United States in Congress assembled, with any king, prince, or state, in pursuance of any treaties already proposed by Congress to the courts of France and Spain.

No vessels of war shall be kept up in time of peace by any state, except such number only as shall be deemed necessary by the United States in Congress assembled for the defence of such state or its trade; nor shall any body of forces be kept up by any state, in time of peace, except such number only as, in the judgment of the United States in Congress assembled, shall be deemed requisite to garrison the forts necessary for the defence of such state; but every state shall always keep up a well-regulated and disciplined militia, sufficiently armed and accoutred, and shall provide and have constantly ready for use, in public stores, a due number of field-pieces and tents, and a proper quantity of arms, ammunition, and camp equipage.

No state shall engage in any war without the consent of the United States in Congress assembled, unless such state be actually invaded by enemies or shall have certain advice of a resolution being formed by some nation of Indians to invade such state, and the danger is so imminent as not to admit of a delay till the United States in Congress assembled can be consulted; nor shall any state grant commission to any ships or vessels of war, nor letters of marque or reprisal, except it be after a declaration of war by the United States in Congress assembled, and then only against the kingdom or state and the subjects thereof against which war has been so declared, and under such regulations as shall be established by the United States in Congress assembled, unless such state be infested by pirates, in which case vessels of war may be fitted out for that occasion and kept so long as the danger shall continue, or until the United States in Congress assembled shall determine otherwise.

ART. 7. When land forces are raised by any state for the common defence, all officers of or under the rank of colonel shall be appointed by the legislatures of each state respectively by whom such forces shall be raised, or in such manner as such state shall direct; and all vacancies shall be filled up by the state which first made the appointment.

ART. 8. All charges of war and all other expenses that shall be incurred for the common defence or general welfare, and allowed by the United States in Congress assembled, shall be defrayed out of a common treasury, which shall be supplied by the several states in proportion to the value of all land within each

state granted to or surveyed for any person, as such land and the buildings and improvements thereon shall be estimated, according to such mode as the United States in Congress assembled shall from time to time direct and appoint.

The taxes for paying that proportion shall be laid and levied by the authority and direction of the legislatures of the several states, within the time agreed upon by the United States in Congress assembled.

ART. 9. The United States in Congress assembled shall have the sole and exclusive right and power of determining on peace and war, except in the cases mentioned in the sixth article; of sending and receiving ambassadors; entering into treaties and alliances, provided that no treaty of commerce shall be made, whereby the legislative power of the respective states shall be restrained from imposing such imposts and duties on foreigners as their own people are subjected to, or from prohibiting the exportation or importation of any species of goods or commodities whatsoever; of establishing rules for deciding in all cases what captures on land or water shall be legal, and in what manner prizes taken by land or naval forces in the service of the United States shall be divided or appropriated; of granting letters of marque and reprisal in time of peace; appointing courts for the trial of piracies and felonies committed on the high seas, and establishing courts for receiving and determining finally appeals in all cases of captures, provided that no member of Congress shall be appointed judge of any of the said courts.

The United States in Congress assembled shall also be the last resort on appeal in all disputes and differences now subsisting or that hereafter may arise between two or more states concerning boundary, jurisdiction, or any other cause whatever, which authority shall always be exercised in the manner following: whenever the legislative or executive authority or lawful agent of any state in controversy with another shall present a petition to Congress, stating the matter in question and praying for a hearing, notice thereof shall be given by order of Congress to the legislative or executive authority of the other state in controversy, and a day assigned for the appearance of the parties by their lawful agents, who shall then be directed to appoint by joint consent commissioners or judges to constitute a court for hearing and determining the matter in question; but if they cannot agree, Congress shall name three persons out of each of the United States, and from the list of such persons each party shall alternately strike out one, the petitioners beginning, until the number shall be reduced to thirteen; and from that number not less than seven nor more than nine names, as Congress shall direct, shall, in the presence of Congress, be drawn out by lot; and the persons whose names shall be so drawn, or any five of them, shall be commissioners or judges to hear and finally determine the controversy, so always as a major part of the judges who shall hear the cause shall agree in the determination; and if either party shall neglect to attend at the day appointed, without showing reasons which Congress shall judge sufficient, or, being present, shall refuse to strike, the Congress shall proceed to nominate three persons out of each state, and the Secretary of Congress shall strike in behalf of such party absent or refusing; and the judgment and sentence of the court to be appointed, in the

manner before prescribed, shall be final and conclusive; and if any of the parties shall refuse to submit to the authority of such court, or to appear or defend their claim or cause, the court shall nevertheless proceed to pronounce sentence or judgment, which shall in like manner be final and decisive, the judgment or sentence and other proceedings being in either case transmitted to Congress, and lodged among the acts of Congress, for the security of the parties concerned: provided, that every commissioner, before he sits in judgment, shall take an oath, to be administered by one of the judges of the Supreme or Superior Court of the state where the cause shall be tried, "well and truly to hear and determine the matter in question, according to the best of his judgment, without favor, affection, or hope of reward;" provided, also, that no state shall be deprived of territory for the benefit of the United States.

All controversies concerning the private right of soil, claimed under different grants of two or more states, whose jurisdictions as they may respect such lands and the states which passed such grants are adjusted, the said grants or either of them being at the same time claimed to have originated antecedent to such settlement of jurisdiction, shall, on the petition of either party to the Congress of the United States, be finally determined, as near as may be in the same manner as is before prescribed for deciding disputes respecting territorial jurisdiction between different states.

The United States in Congress assembled shall also have the sole and exclusive right and power of regulating the alloy and value of coin struck by their own authority, or by that of the respective states; fixing the standard of weights and measures throughout the United States; regulating the trade and managing all affairs with the Indians not members of any of the states, provided that the legislative right of any state within its own limits be not infringed or violated; establishing and regulating post-offices from one state to another throughout all the United States, and exacting such postage on the papers passing through the same as may be requisite to defray the expenses of the said office; appointing all officers of the naval forces, and commissioning all officers whatever in the service of the United States; making rules for the government and regulation of the said land and naval forces, and directing their operations.

The United States in Congress assembled shall have authority to appoint a committee to sit in the recess of Congress, to be denominated "a Committee of the States," and to consist of one delegate from each state, and to appoint such other committees and civil officers as may be necessary for managing the general affairs of the United States, under their direction; to appoint one of their number to preside, provided that no person be allowed to serve in the office of President more than one year in any term of three years; to ascertain the necessary sums of money to be raised for the service of the United States, and to appropriate and apply the same for defraying the public expenses; to borrow money or emit bills on the credit of the United States, transmitting every half-year to the respective states an account of the sums of money so borrowed or emitted; to build and equip a navy; to agree upon the number of land forces, and to make requisitions from each state for its quota, in proportion to the

number of white inhabitants in such state; which requisition shall be binding, and thereupon the legislature of each state shall appoint the regimental officers, raise the men, and clothe, arm, and equip them in a soldierlike manner, at the expense of the United States; and the officers and men to be clothed, armed, and equipped shall march to the place appointed, and within the time agreed on, by the United States in Congress assembled: but if the United States in Congress assembled shall, on consideration of circumstances, judge proper that any state should not raise men or should raise a smaller number than its quota, and that any other state should raise a greater number of men than the quota thereof, such extra number shall be raised, officered, clothed, armed, and equipped in the same manner as the quota of such state, unless the legislature of such state shall judge that such extra number cannot be safely spared out of the same, in which case they shall raise, officer, clothe, arm, and equip as many of such extra number as they judge can be safely spared. And the officers and men so clothed, armed, and equipped shall march to the place appointed, and within the time agreed on, by the United States in Congress assembled.

The United States in Congress assembled shall never engage in a war nor grant letters of marque and reprisal in time of peace, nor enter into any treaties or alliances, nor coin money nor regulate the value thereof, nor ascertain the sums and expenses necessary for the defence and welfare of the United States, or any of them; nor emit bills, nor borrow money on the credit of the United States, nor appropriate money, nor agree upon the number of vessels of war to be built or purchased, or the number of land or sea forces to be raised, nor appoint a commander-in-chief of the army or navy, unless nine states assent to the same; nor shall a question on any other point, except for adjourning from day to day, be determined, unless by the votes of a majority of the United States in Congress assembled.

The Congress of the United States shall have power to adjourn to any time within the year, and to any place within the United States, so that no period of adjournment be for a longer duration than the space of six months, and shall publish the journal of their proceedings monthly, except such parts thereof relating to treaties, alliances, or military operations, as in their judgment require secrecy; and the yeas and nays of the delegates of each state on any question shall be entered on the journal, when it is desired by any delegate; and the delegates of a state, or any of them, at his or their request, shall be furnished with a transcript of the said journal, except such parts as are above excepted, to lay before the legislatures of the several states.

ART. 10. The Committee of the States, or any nine of them, shall be authorized to execute, in the recess of Congress, such of the powers of Congress as the United States in Congress assembled, by the consent of nine states, shall, from time to time, think expedient to vest them with, provided that no power be delegated to the said Committee, for the exercise of which, by the Articles of Confederation, the voice of nine states in the Congress of the United States assembled is requisite.

ART. 11. Canada, acceding to this Confederation, and joining in the meas-

ures of the United States, shall be admitted into and entitled to all the advantages of this Union ; but no other Colony shall be admitted into the same unless such admission be agreed to by nine states.

ART. 12. All bills of credit emitted, moneys borrowed, and debts contracted by or under the authority of Congress, before the assembling of the United States, in pursuance of the present Confederation, shall be deemed and considered as a charge against the United States, for payment and satisfaction whereof the said United States and the public faith are hereby solemnly pledged.

ART. 13. Every state shall abide by the determinations of the United States in Congress assembled on all questions which by this Confederation are submitted to them. And the Articles of this Confederation shall be inviolably observed by every state, and the Union shall be perpetual ; nor shall any alteration at any time hereafter be made in any of them ; unless such alteration be agreed to in a Congress of the United States, and be afterwards confirmed by the legislatures of every state.

These Articles shall be proposed to the legislatures of all the United States, to be considered, and if approved of by them, they are advised to authorize their delegates to ratify the same in the Congress of the United States ; which being done, the same shall become conclusive.

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## MEMBERS OF THE CONVENTION WHICH FORMED THE CONSTITUTION.<sup>1</sup>

Those with numbers before their names signed the Constitution. Those without numbers attended, but did not sign. The dates denote the first day of their attendance. Those in italics never attended.

### NEW HAMPSHIRE.

1. John Langdon,	23 July.	2. Nicholas Gilman,	23 July.
<i>John Pickering.</i>		<i>Benjamin West.</i>	

### MASSACHUSETTS.

<i>Francis Dana.</i>		4. Rufus King,	25 May.
Elbridge Gerry,	29 May.	Caleb Strong,	28 May.
3. Nathaniel Gorham,	28 May.		

### RHODE ISLAND. [No appointment.]

### CONNECTICUT.

5. William S. Johnson,	2 June.	Oliver Ellsworth,	29 May.
6. Roger Sherman,	30 May.		

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<sup>1</sup> This table is taken from the 12th volume of Mr. Sparks's edition of Washington's Writings, p. 426.



## NEW YORK.

Robert Yates,	25 May.	John Lansing.	2 June.
7. Alexander Hamilton,	25 May.		

## NEW JERSEY.

8. William Livingston,	5 June.	<i>John Neilson.</i>	
9. David Brearley,	25 May.	<i>Abraham Clark.</i>	
William C. Houston,	25 May.	11. Jonathan Dayton,	21 June.
10. William Patterson,	25 May.		

## PENNSYLVANIA.

12. Benjamin Franklin,	28 May.	16. Thomas Fitzsimons,	25 May.
13. Thomas Mifflin,	28 May.	17. Jared Ingersoll,	28 May.
14. Robert Morris,	25 May.	18. James Wilson,	25 May.
15. George Clymer,	28 May.	19. Gouverneur Morris,	25 May.

## DELAWARE.

20. George Read,	25 May.	23. Richard Bassett,	25 May.
21. Gunning Bedford, Jr.,	28 May.	24. Jacob Broom,	25 May.
22. John Dickinson,	28 May.		

## MARYLAND.

25. James McHenry,	29 May.	27. Daniel Carroll,	9 July.
26. Daniel of St. Thomas		John Francis Mercer,	6 Aug.
Jenifer,	2 June.	Luther Martin,	9 June.

## VIRGINIA.

28. George Washington,	25 May.	George Mason,	25 May.
<i>Patrick Henry</i> (declined).		George Wythe,	25 May.
Edmund Randolph,	24 May.	James McClurg (in the	
29. John Blair,	25 May.	room of P. Henry),	25 May.
30. James Madison, Jr.,	25 May.		

## NORTH CAROLINA.

<i>Richard Caswell</i> (resigned).		<i>Willie Jones</i> (declined).	
Alexander Martin,	25 May.	32. Richard D. Spaight,	25 May.
William R. Davie,	25 May.	33. Hugh Williamson (in the	
31. William Blount (in the		room of W. Jones),	25 May.
room of R. Caswell),	20 June.		

## SOUTH CAROLINA.

34. John Rutledge,	25 May.	36. Charles Pinckney,	25 May.
35. Charles C. Pinckney,	25 May.	37. Pierce Butler,	25 May.

## GEORGIA.

38. William Few,	25 May.	<i>George Walton.</i>	
39. Abraham Baldwin,	11 June.	William Houstoun,	1 June.
William Pierce,	31 May.	<i>Nathaniel Pendleton.</i>	

## FIRST DRAFT OF THE CONSTITUTION,

AS REPORTED BY THE COMMITTEE OF DETAIL.

MONDAY, August 6th.

*In Convention.*—Mr. RUTLEDGE delivered in the report of the committee of detail, as follows—a printed copy being at the same time furnished to each member:

We, the people of the states of New Hampshire, Massachusetts, Rhode Island and Providence Plantations, Connecticut, New York, New Jersey, Pennsylvania, Delaware, Maryland, Virginia, North Carolina, South Carolina, and Georgia, do ordain, declare, and establish the following Constitution for the government of ourselves and our posterity:

ARTICLE I.—The style of the government shall be, “The United States of America.”

ART. II.—The government shall consist of supreme, legislative, executive, and judicial powers.

ART. III.—The legislative power shall be vested in a Congress, to consist of two separate and distinct bodies of men, a House of Representatives and a Senate; each of which shall in all cases have a negative on the other. The legislature shall meet on the first Monday in December in every year.

ART. IV.—Sect. 1. The members of the House of Representatives shall be chosen, every second year, by the people of the several states comprehended within this Union. The qualifications of the electors shall be the same, from time to time, as those of the electors, in the several states, of the most numerous branch of their own legislatures.

Sect. 2. Every member of the House of Representatives shall be of the age of twenty-five years at least; shall have been a citizen in the United States for at least three years before his election; and shall be, at the time of his election, a resident of the state in which he shall be chosen.

Sect. 3. The House of Representatives shall, at its first formation, and until the number of citizens and inhabitants shall be taken in the manner hereinafter described, consist of sixty-five members, of whom three shall be chosen in New Hampshire, eight in Massachusetts, one in Rhode Island and Providence Plantations, five in Connecticut, six in New York, four in New Jersey, eight in Pennsylvania, one in Delaware, six in Maryland, ten in Virginia, five in North Carolina, five in South Carolina, and three in Georgia.

Sect. 4. As the proportions of numbers in different states will alter from time to time; as some of the states may hereafter be divided; as others may be enlarged by addition of territory; as two or more states may be united; as new states will be erected within the limits of the United States—the legislature shall, in each of these cases, regulate the number of representatives by the num-

ber of inhabitants, according to the provisions hereinafter made, at the rate of one for every forty thousand.

Sect. 5. All bills for raising or appropriating money, and for fixing the salaries of the officers of government, shall originate in the House of Representatives, and shall not be altered or amended by the Senate. No money shall be drawn from the public treasury, but in pursuance of appropriations that shall originate in the House of Representatives.

Sect. 6. The House of Representatives shall have the sole power of impeachment. It shall choose its speaker and other officers.

Sect. 7. Vacancies in the House of Representatives shall be supplied by writs of election from the executive authority of the state in the representation from which they shall happen.

ART. V.—Sect. 1. The Senate of the United States shall be chosen by the legislatures of the several states. Each legislature shall choose two members. Vacancies may be supplied by the executive until the next meeting of the legislature. Each member shall have one vote.

Sect. 2. The senators shall be chosen for six years; but immediately after the first election, they shall be divided, by lot, into three classes, as nearly as may be, numbered one, two, and three. The seats of the members of the first class shall be vacated at the expiration of the second year; of the second class at the expiration of the fourth year; of the third class at the expiration of the sixth year; so that a third part of the members may be chosen every second year.

Sect. 3. Every member of the Senate shall be of the age of thirty years at least; shall have been a citizen in the United States for at least four years before his election; and shall be, at the time of his election, a resident of the state for which he shall be chosen.

Sect. 4. The Senate shall choose its own president and other officers.

ART. VI.—Sect. 1. The times, and places, and manner, of holding the elections of the members of each House, shall be prescribed by the legislature of each state; but their provisions concerning them may, at any time, be altered by the legislature of the United States.

Sect. 2. The legislature of the United States shall have authority to establish such uniform qualifications of the members of each House, with regard to property, as to the said legislature shall seem expedient.

Sect. 3. In each House a majority of the members shall constitute a quorum to do business; but a smaller number may adjourn from day to day.

Sect. 4. Each House shall be the judge of the elections, returns, and qualifications of its own members.

Sect. 5. Freedom of speech and debate in the legislature shall not be impeached or questioned in any court or place out of the legislature; and the members of each House shall, in all cases, except treason, felony, and breach of the peace, be privileged from arrest during their attendance at Congress, and in going to and returning from it.

Sect. 6. Each House may determine the rules of its proceedings; may punish its members for disorderly behavior; and may expel a member.

Sect. 7. The House of Representatives, and the Senate when it shall be acting in a legislative capacity, shall keep a journal of their proceedings; and shall, from time to time, publish them; and the yeas and nays of the members of each House, on any question, shall, at the desire of one fifth part of the members present, be entered on the Journal.

Sect. 8. Neither House, without the consent of the other, shall adjourn for more than three days, nor to any other place than that at which the two Houses are sitting. But this regulation shall not extend to the Senate when it shall exercise the powers mentioned in the — Article.

Sect. 9. The members of each House shall be ineligible to, and incapable of holding, any office under the authority of the United States, during the time for which they shall respectively be elected; and the members of the Senate shall be ineligible to, and incapable of holding, any such office for one year afterwards.

Sect. 10. The members of each House shall receive a compensation for their services, to be ascertained and paid by the state in which they shall be chosen.

Sect. 11. The enacting style of the laws of the United States shall be, "Be it enacted, and it is hereby enacted, by the House of Representatives, and by the Senate of the United States, in Congress assembled."

Sect. 12. Each House shall possess the right of originating bills, except in the cases before mentioned.

Sect. 13. Every bill which shall have passed the House of Representatives and the Senate shall, before it becomes a law, be presented to the President of the United States for his revision. If, upon such revision, he approve of it, he shall signify his approbation by signing it. But if, upon such revision, it shall appear to him improper for being passed into a law, he shall return it, together with his objections against it, to that House in which it shall have originated; who shall enter the objections at large on their Journal, and proceed to reconsider the bill. But if, after such reconsideration, two thirds of that House shall, notwithstanding the objections of the President, agree to pass it, it shall, together with his objections, be sent to the other House, by which it shall likewise be reconsidered, and, if approved by two thirds of the other House also, it shall become a law. But, in all such cases, the votes of both Houses shall be determined by yeas and nays; and the names of the persons voting for or against the bill shall be entered on the Journal of each House respectively. If any bill shall not be returned by the President within seven days after it shall have been presented to him, it shall be a law, unless the legislature, by their adjournment, prevent its return, in which case it shall not be a law.

ART. VII.—Sect. 1. The legislature of the United States shall have the power to lay and collect taxes, duties, imposts, and excises;

To regulate commerce with foreign nations, and among the several states;

To establish an uniform rule of naturalization throughout the United States;

To coin money;

To regulate the value of foreign coin;

To fix the standard of weights and measures;

To establish post-offices;

To borrow money, and emit bills, on the credit of the United States;

To appoint a treasurer by ballot;

To constitute tribunals inferior to the supreme court;

To make rules concerning captures on land and water;

To declare the law and punishment of piracies and felonies committed on the high seas, and the punishment of counterfeiting the coin of the United States, and of offences against the law of nations;

To subdue a rebellion in any state on the application of its legislature;

To make war;

To raise armies;

To build and equip fleets;

To call forth the aid of the militia, in order to execute the laws of the Union, enforce treaties, suppress insurrections, and repel invasions;

And to make all laws that shall be necessary and proper for carrying into execution the foregoing powers, and all other powers vested by this Constitution in the government of the United States, or in any department or office thereof.

Sect. 2. Treason against the United States shall consist only in levying war against the United States, or any of them; and in adhering to the enemies of the United States, or any of them. The legislature of the United States shall have power to declare the punishment of treason. No person shall be convicted of treason, unless on the testimony of two witnesses. No attainder of treason shall work corruption of blood, nor forfeiture, except during the life of the person attainted.

Sect. 3. The proportions of direct taxation shall be regulated by the whole number of white and other free citizens and inhabitants of every age, sex, and condition, including those bound to servitude for a term of years, and three fifths of all other persons not comprehended in the foregoing description (except Indians not paying taxes); which number shall, within six years after the first meeting of the legislature, and within the term of every ten years afterwards, be taken in such a manner as the said legislature shall direct.

Sect. 4. No tax or duty shall be laid by the legislature on articles exported from any state; nor on the migration or importation of such persons as the several states shall think proper to admit; nor shall such migration or importation be prohibited.

Sect. 5. No capitation tax shall be laid, unless in proportion to the census hereinbefore directed to be taken.

Sect. 6. No navigation act shall be passed without the assent of two thirds of the members present in each House.

Sect. 7. The United States shall not grant any title of nobility.

ART. VIII.—The acts of the legislature of the United States made in pursuance of this Constitution, and all treaties made under the authority of the United States, shall be the supreme law of the several states, and of their citizens and inhabitants; and the judges in the several states shall be bound thereby in their decisions, anything in the constitutions or laws of the several states to the contrary notwithstanding.

**ART. IX.—Sect. 1.** The Senate of the United States shall have power to make treaties, and to appoint ambassadors, and judges of the supreme court.

**Sect. 2.** In all disputes and controversies now subsisting, or that may hereafter subsist, between two or more states, respecting jurisdiction or territory, the Senate shall possess the following powers: Whenever the legislature, or the executive authority, or lawful agent of any state, in controversy with another, shall, by memorial to the Senate, state the matter in question, and apply for a hearing, notice of such memorial and application shall be given, by order of the Senate, to the legislature, or the executive authority, of the other state in controversy. The Senate shall also assign a day for the appearance of the parties, by their agents, before that House. The agents shall be directed to appoint, by joint consent, commissioners or judges to constitute a court for hearing and determining the matter in question. But if the agents cannot agree, the Senate shall name three persons out of each of the several states; and from the list of such persons, each party shall alternately strike out one, until the number shall be reduced to thirteen; and from that number not less than seven, nor more than nine names, as the Senate shall direct, shall, in their presence, be drawn out by lot; and the persons whose names shall be so drawn, or any five of them, shall be commissioners or judges to hear and finally determine the controversy; provided a majority of the judges who shall hear the cause agree in the determination. If either party shall neglect to attend at the day assigned, without showing sufficient reasons for not attending, or being present shall refuse to strike, the Senate shall proceed to nominate three persons out of each state, and the Clerk of the Senate shall strike in behalf of the party absent or refusing. If any of the parties shall refuse to submit to the authority of such court, or shall not appear to prosecute or defend their claim or cause, the court shall nevertheless proceed to pronounce judgment. The judgment shall be final and conclusive. The proceedings shall be transmitted to the President of the Senate, and shall be lodged among the public records, for the security of the parties concerned. Every commissioner shall, before he sit in judgment, take an oath, to be administered by one of the judges of the supreme or superior court of the state where the cause shall be tried, "well and truly to hear and determine the matter in question, according to the best of his judgment, without favor, affection, or hope of reward."

**Sect. 3.** All controversies concerning lands claimed under different grants of two or more states, whose jurisdictions, as they respect such lands, shall have been decided or adjusted subsequently to such grants, or any of them, shall, on application to the Senate, be finally determined, as near as may be, in the same manner as is before prescribed for deciding controversies between different states.

**ART. X.—Sect. 1.** The executive power of the United States shall be vested in a single person. His style shall be, "The President of the United States of America," and his title shall be, "His Excellency." He shall be elected by ballot by the legislature. He shall hold his office during the term of seven years; but shall not be elected a second time.

**Sect. 2.** He shall, from time to time, give information to the legislature of

the state of the Union. He may recommend to their consideration such measures as he shall judge necessary and expedient. He may convene them on extraordinary occasions. In case of disagreement between the two Houses, with regard to the time of adjournment, he may adjourn them to such time as he thinks proper. He shall take care that the laws of the United States be duly and faithfully executed. He shall commission all the officers of the United States; and shall appoint officers in all cases not otherwise provided for by this Constitution. He shall receive ambassadors, and may correspond with the supreme executives of the several states. He shall have power to grant reprieves and pardons, but his pardon shall not be pleadable in bar of an impeachment. He shall be commander-in-chief of the army and navy of the United States, and of the militia of the several states. He shall, at stated times, receive for his services a compensation, which shall neither be increased nor diminished during his continuance in office. Before he shall enter on the duties of his department, he shall take the following oath or affirmation, "I — solemnly swear (or affirm) that I will faithfully execute the office of President of the United States of America." He shall be removed from his office on impeachment by the House of Representatives, and conviction, in the supreme court, of treason, bribery, or corruption. In case of his removal, as aforesaid, death, resignation, or disability to discharge the powers and duties of his office, the President of the Senate shall exercise those powers and duties until another President of the United States be chosen, or until the disability of the President be removed.

ART. XI.—Sect. 1. The judicial power of the United States shall be vested in one supreme court, and in such inferior courts as shall, when necessary, from time to time, be constituted by the legislature of the United States.

Sect. 2. The judges of the supreme court, and of the inferior courts, shall hold their offices during good behavior. They shall, at stated times, receive for their services a compensation, which shall not be diminished during their continuance in office.

Sect. 3. The jurisdiction of the supreme court shall extend to all cases arising under laws passed by the legislature of the United States; to all cases affecting ambassadors, other public ministers and consuls; to the trial of impeachments of officers of the United States; to all cases of admiralty and maritime jurisdiction; to controversies between two or more states (except such as shall regard territory or jurisdiction); between a state and citizens of another state; between citizens of different states; and between a state, or the citizens thereof, and foreign states, citizens, or subjects. In cases of impeachment, cases affecting ambassadors, other public ministers and consuls, and those in which a state shall be party, this jurisdiction shall be original. In all the other cases before mentioned, it shall be appellate, with such exceptions, and under such regulations, as the legislature shall make. The legislature may assign any part of the jurisdiction above mentioned (except the trial of the President of the United States), in the manner and under the limitations which it shall think proper, to such inferior courts as it shall constitute from time to time.

Sect. 4. The trial of all criminal offences (except in cases of impeachment) shall be in the state where they shall be committed ; and shall be by jury.

Sect. 5. Judgment, in cases of impeachment, shall not extend further than to removal from office, and disqualification to hold and enjoy any office of honor, trust, or profit, under the United States. But the party convicted shall nevertheless be liable and subject to indictment, trial, judgment, and punishment, according to law.

ART. XII.—No state shall coin money; nor grant letters of marque and reprisal; nor enter into any treaty, alliance, or confederation ; nor grant any title of nobility.

ART. XIII.—No state, without the consent of the legislature of the United States, shall emit bills of credit, or make anything but specie a tender in payment of debts ; nor lay imposts or duties on imports ; nor keep troops or ships of war in time of peace ; nor enter into any agreement or compact with another state, or with any foreign power ; nor engage in any war, unless it shall be actually invaded by enemies, or the danger of invasion be so imminent as not to admit of a delay until the legislature of the United States can be consulted.

ART. XIV.—The citizens of each state shall be entitled to all privileges and immunities of citizens in the several states.

ART. XV.—Any person charged with treason, felony, or high misdemeanor in any state, who shall flee from justice, and shall be found in any other state, shall, on demand of the executive power of the state from which he fled, be delivered up and removed to the state having jurisdiction of the offence.

ART. XVI.—Full faith shall be given in each state to the acts of the legislatures, and to the records and judicial proceedings of the courts and magistrates, of every other state.

ART. XVII.—New states lawfully constituted or established within the limits of the United States may be admitted, by the legislature, into this government ; but to such admission the consent of two thirds of the members present in each House shall be necessary. If a new state shall arise within the limits of any of the present states, the consent of the legislatures of such states shall be also necessary to its admission. If the admission be consented to, the new states shall be admitted on the same terms with the original states. But the legislature may make conditions with the new states concerning the public debt which shall be then subsisting.

ART. XVIII.—The United States shall guarantee to each state a republican form of government ; and shall protect each state against foreign invasions, and, on the application of its legislature, against domestic violence.

ART. XIX.—On the application of the legislatures of two thirds of the states in the Union, for an amendment of this Constitution, the legislature of the United States shall call a convention for that purpose.

ART. XX.—The members of the legislatures, and the executive and judicial officers of the United States, and of the several states, shall be bound by oath to support this Constitution.

ART. XXI.—The ratification of the conventions of — states shall be sufficient for organizing this Constitution.



ART. XXII.—This Constitution shall be laid before the United States in Congress assembled, for their approbation; and it is the opinion of this Convention, that it should be afterwards submitted to a convention chosen in each state, under the recommendation of its legislature, in order to receive the ratification of such convention.

ART. XXIII.—To introduce this government, it is the opinion of this Convention, that each assenting convention should notify its assent and ratification to the United States in Congress assembled; that Congress, after receiving the assent and ratification of the conventions of—states, should appoint and publish a day, as early as may be, and appoint a place, for commencing proceedings under this Constitution; that, after such publication, the legislatures of the several states should elect members of the Senate, and direct the election of members of the House of Representatives; and that the members of the legislature should meet at the time and place assigned by Congress, and should, as soon as may be after their meeting, choose the President of the United States, and proceed to execute this Constitution.

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## CONSTITUTION OF THE UNITED STATES OF AMERICA.\*

WE the People of the United States, in order to form a more perfect Union, establish Justice, insure domestic Tranquillity, provide for the common defence, promote the general Welfare, and secure the Blessings of Liberty to ourselves and our Posterity, do ordain and establish this CONSTITUTION for the United States of America.

### ARTICLE. I.

SECTION. 1. All legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives.

SECTION. 2. The House of Representatives shall be composed of Members chosen every second Year by the People of the several States, and the Electors in each State shall have the Qualifications requisite for Electors of the most numerous Branch of the State Legislature.

\*No Person shall be a Representative who shall not have attained to the Age of twenty five Years, and been seven Years a Citizen of the United States, and

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\* This copy of the Constitution has been compared with the Rolls in the Department of State, and is punctuated and otherwise printed in exact conformity therewith.

who shall not, when elected, be an Inhabitant of that State in which he shall be chosen.

Representatives and direct Taxes shall be apportioned among the several States which may be included within this Union, according to their respective Numbers, which shall be determined by adding to the whole Number of free Persons, including those bound to Service for a Term of Years, and excluding Indians not taxed, three fifths of all other Persons. The actual Enumeration shall be made within three Years after the first Meeting of the Congress of the United States, and within every subsequent Term of ten Years, in such Manner as they shall by Law direct. The Number of Representatives shall not exceed one for every thirty Thousand, but each State shall have at Least one Representative; and until such enumeration shall be made, the State of New Hampshire shall be entitled to chuse three, Massachusetts eight, Rhode-Island and Providence Plantations one, Connecticut five, New-York six, New Jersey four, Pennsylvania eight, Delaware one, Maryland six, Virginia ten, North Carolina five, South Carolina five, and Georgia three.

When vacancies happen in the Representation from any State, the Executive Authority thereof shall issue Writs of Election to fill such Vacancies.

The House of Representatives shall chuse their Speaker and other Officers; and shall have the sole Power of Impeachment.

SECTION. 3. The Senate of the United States shall be composed of two Senators from each State, chosen by the Legislature thereof, for six Years; and each Senator shall have one Vote.

Immediately after they shall be assembled in Consequence of the first Election, they shall be divided as equally as may be into three Classes. The Seats of the Senators of the first Class shall be vacated at the Expiration of the second Year, of the second Class at the Expiration of the fourth Year, and of the third Class at the Expiration of the sixth Year, so that one-third may be chosen every second Year; and if Vacancies happen by Resignation, or otherwise, during the Recess of the Legislature of any State, the Executive thereof may make temporary Appointments until the next Meeting of the Legislature, which shall then fill such Vacancies.

No Person shall be a Senator who shall not have attained to the Age of thirty Years, and been nine Years a Citizen of the United States, and who shall not, when elected, be an Inhabitant of that State for which he shall be chosen.

The Vice President of the United States shall be President of the Senate, but shall have no Vote, unless they be equally divided.

The Senate shall chuse their other Officers, and also a President pro tempore, in the Absence of the Vice President, or when he shall exercise the office of President of the United States.

The Senate shall have the sole Power to try all Impeachments. When sitting for that Purpose, they shall be on Oath or Affirmation. When the President of the United States is tried, the Chief Justice shall preside: And no Person shall be convicted without the Concurrence of two thirds of the Members present.

'Judgment in Cases of Impeachment shall not extend further than to removal from Office, and Disqualification to hold and enjoy any Office of honour, Trust or Profit under the United States: but the Party convicted shall nevertheless be liable and subject to Indictment, Trial, Judgment and Punishment, according to Law.

SECTION. 4. 'The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations, except as to the Places of chusing Senators.

'The Congress shall assemble at least once in every Year, and such Meeting shall be on the first Monday in December, unless they shall by Law appoint a different Day.

SECTION. 5. 'Each House shall be the Judge of the Elections, Returns and Qualifications of its own Members, and a Majority of each shall constitute a Quorum to do business; but a smaller Number may adjourn from day to day, and may be authorized to compel the Attendance of absent Members, in such Manner, and under such Penalties as each House may provide.

'Each House may determine the Rules of its Proceedings, punish its Members for disorderly Behaviour, and, with the Concurrence of two thirds, expel a Member.

'Each House shall keep a Journal of its Proceedings, and from time to time publish the same, excepting such Parts as may in their Judgment require Secrecy; and the Yeas and Nays of the Members of either House on any question shall, at the Desire of one fifth of those Present, be entered on the Journal.

'Neither House, during the Session of Congress, shall, without the Consent of the other, adjourn for more than three days, nor to any other Place than that in which the two Houses shall be sitting.

SECTION. 6. 'The Senators and Representatives shall receive a Compensation for their Services, to be ascertained by Law, and paid out of the Treasury of the United States. They shall in all Cases, except Treason, Felony and Breach of the Peace, be privileged from Arrest during their Attendance at the Session of their respective Houses, and in going to and returning from the same; and for any Speech or Debate in either House, they shall not be questioned in any other Place.

'No Senator or Representative shall, during the Time for which he was elected, be appointed to any civil Office under the Authority of the United States, which shall have been created, or the Emoluments whereof shall have been encreased during such time; and no Person holding any Office under the United States, shall be a member of either House during his Continuance in Office.

SECTION. 7. 'All Bills for raising Revenue shall originate in the House of Representatives; but the Senate may propose or concur with Amendments as on other Bills.

'Every Bill which shall have passed the House of Representatives and the Senate, shall, before it become a Law, be presented to the President of the United States; If he approve he shall sign it, but if not he shall return it, with his Ob-

jections to that House in which it shall have originated, who shall enter the Objections at large on their Journal, and proceed to reconsider it. If after such Reconsideration two thirds of that House shall agree to pass the Bill, it shall be sent, together with the Objections, to the other House, by which it shall likewise be reconsidered, and if approved by two thirds of that House, it shall become a Law. But in all such Cases the Votes of both Houses shall be determined by yeas and Nays, and the Names of the Persons voting for and against the Bill shall be entered on the Journal of each House respectively. If any Bill shall not be returned by the President within ten Days (Sundays excepted) after it shall have been presented to him, the Same shall be a Law, in like Manner as if he had signed it, unless the Congress by their Adjournment prevent its Return, in which Case it shall not be a Law.

Every Order, Resolution, or Vote to which the Concurrence of the Senate and House of Representatives may be necessary (except on a question of Adjournment) shall be presented to the President of the United States; and before the same shall take Effect, shall be approved by him, or being disapproved by him, shall be repassed by two thirds of the Senate and House of Representatives, according to the Rules and Limitations prescribed in the Case of a Bill.

SECTION. 8. The Congress shall have Power To lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States; but all Duties, Imposts and Excises shall be uniform throughout the United States;

To borrow Money on the credit of the United States;

To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes;

To establish a uniform Rule of Naturalization, and uniform Laws on the subject of Bankruptcies throughout the United States;

To coin Money, regulate the Value thereof, and of foreign Coin, and fix the Standard of Weights and Measures;

To provide for the Punishment of counterfeiting the Securities and current Coin of the United States;

To establish Post Offices and post Roads;

To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries;

To constitute Tribunals inferior to the supreme Court;

To define and punish Piracies and Felonies committed on the high Seas, and Offences against the Law of Nations;

To declare War, grant Letters of Marque and Reprisal, and make Rules concerning Captures on Land and Water;

To raise and support Armies, but no Appropriation of Money to that Use shall be for a longer Term than two Years;

To provide and maintain a Navy;

To make Rules for the Government and Regulation of the land and naval Forces;

<sup>14</sup>To provide for calling forth the Militia to execute the Laws of the Union, suppress Insurrections and repel Invasions;

<sup>15</sup>To provide for organizing, arming, and disciplining, the Militia, and for governing such Part of them as may be employed in the Service of the United States, reserving to the States respectively, the Appointment of the Officers, and the Authority of training the Militia according to the discipline prescribed by Congress;

<sup>16</sup>To exercise exclusive Legislation in all Cases whatsoever, over such District (not exceeding ten Miles square) as may, by Cession of particular States, and the Acceptance of Congress, become the Seat of the Government of the United States, and to exercise like Authority over all Places purchased by the Consent of the Legislature of the State in which the same shall be, for the Erection of Forts, Magazines, Arsenals, Dock-Yards, and other needful Buildings;—And

<sup>17</sup>To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof.

SECTION. 9. <sup>1</sup>The Migration or Importation of such Persons as any of the States now existing shall think proper to admit, shall not be prohibited by the Congress prior to the Year one thousand eight hundred and eight, but a Tax or Duty may be imposed on such Importation, not exceeding ten dollars for each Person.

<sup>2</sup>The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it.

<sup>3</sup>No Bill of Attainder or ex post facto Law shall be passed.

<sup>4</sup>No Capitation, or other direct, Tax shall be laid, unless in Proportion to the Census or Enumeration herein before directed to be taken.

<sup>5</sup>No Tax or Duty shall be laid on Articles exported from any State.

<sup>6</sup>No Preference shall be given by any Regulation of Commerce or Revenue to the Ports of one State over those of another: nor shall Vessels bound to, or from, one State, be obliged to enter, clear, or pay Duties in another.

<sup>7</sup>No Money shall be drawn from the Treasury, but in consequence of Appropriations made by Law; and a regular Statement and Account of the Receipts and Expenditures of all public Money shall be published from time to time.

<sup>8</sup>No Title of Nobility shall be granted by the United States: And no Person holding any Office of Profit or Trust under them, shall, without the Consent of the Congress, accept of any present, Emolument, Office, or Title, of any kind whatever, from any King, Prince, or foreign State.

SECTION. 10. <sup>1</sup>No State shall enter into any Treaty, Alliance, or Confederation; grant Letters of Marque and Reprisal; coin Money; emit Bills of Credit; make any Thing but gold and silver Coin a Tender in Payment of Debts; pass any Bill of Attainder, ex post facto Law, or Law impairing the Obligation of Contracts, or grant any Title of Nobility.

<sup>2</sup>No State shall, without the Consent of the Congress, lay any Imposts or Duties on Imports or Exports, except what may be absolutely necessary for executing it's inspection Laws: and the net Produce of all Duties and Imposts, laid by any

State on Imports or Exports, shall be for the Use of the Treasury of the United States; and all such Laws shall be subject to the Revision and Controul of the Congress.

\*No State shall, without the Consent of Congress, lay any Duty of Tonnage, keep Troops, or Ships of War in time of Peace, enter into any Agreement or Compact with another State, or with a foreign Power, or engage in War, unless actually invaded, or in such imminent Danger as will not admit of Delay.

#### ARTICLE. II.

SECTION. 1. 'The executive Power shall be vested in a President of the United States of America. He shall hold his Office during the Term of four Years, and, together with the Vice President, chosen for the same Term, be elected, as follows

'Each State shall appoint, in such Manner as the Legislature thereof may direct, a Number of Electors, equal to the whole Number of Senators and Representatives to which the State may be entitled in the Congress: but no Senator or Representative, or Person holding an Office of Trust or Profit under the United States, shall be appointed an Elector.

The Electors shall meet in their respective States, and vote by Ballot for two Persons, of whom one at least shall not be an Inhabitant of the same State with themselves. And they shall make a List of all the Persons voted for, and of the Number of Votes for each; which List they shall sign and certify, and transmit sealed to the Seat of the Government of the United States, directed to the President of the Senate. The President of the Senate shall, in the Presence of the Senate and House of Representatives, open all the Certificates, and the Votes shall then be counted. The Person having the greatest Number of Votes shall be the President, if such Number be a Majority of the whole Number of Electors appointed; and if there be more than one who have such Majority, and have an equal Number of Votes, then the House of Representatives shall immediately chuse by Ballot one of them for President; and if no Person have a Majority, then from the five highest on the List the said House shall in like Manner chuse the President. But in chusing the President, the Votes shall be taken by States, the Representation from each State having one Vote; A quorum for this Purpose shall consist of a Member or Members from twothirds of the States, and a Majority of all the States shall be necessary to a Choice. In every Case, after the Choice of the President, the Person having the greatest Number of Votes of the Electors shall be the Vice President. But if there should remain two or more who have equal Votes, the Senate shall chuse from them by Ballot the Vice President.\*

\*The Congress may determine the Time of chusing the Electors, and the Day on which they shall give their Votes; which Day shall be the same throughout the United States.

\*No Person except a natural born Citizen, or a Citizen of the United States, at the time of the Adoption of this Constitution, shall be eligible to the Office of

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\* Altered by the 12th Amendment.

President; neither shall any Person be eligible to that Office who shall not have attained to the Age of thirty five Years, and been fourteen Years a Resident within the United States.

‘In Case of the Removal of the President from Office, or of his Death, Resignation, or Inability to discharge the Powers and Duties of the said Office, the same shall devolve on the Vice President, and the Congress may by Law provide for the Case of Removal, Death, Resignation or Inability, both of the President and Vice President, declaring what Officer shall then act as President, and such Officer shall act accordingly, until the Disability be removed, or a President shall be elected.

‘The President shall, at stated Times, receive for his Services, a Compensation, which shall neither be encreased nor diminished during the Period for which he shall have been elected, and he shall not receive within that Period any other Emolument from the United States, or any of them.

‘Before he enter on the Execution of his Office, he shall take the following Oath or Affirmation :—

“ I do solemnly swear (or affirm) that I will faithfully execute the Office of “ President of the United States, and will to the best of my Ability, preserve, protect and defend the Constitution of the United States.”

SECTION. 2. ‘The President shall be Commander in Chief of the Army and Navy of the United States, and of the Militia of the several States, when called into the actual Service of the United States; he may require the Opinion, in writing, of the principal Officer in each of the executive Departments, upon any Subject relating to the Duties of their respective Offices, and he shall have Power to grant Reprieves and Pardons for Offences against the United States, except in Cases of Impeachment.

‘He shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two thirds of the Senators present concur; and he shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law: but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments.

‘The President shall have Power to fill up all Vacancies that may happen during the Recess of the Senate, by granting Commissions which shall expire at the End of their next Session.

SECTION. 3. He shall from time to time give to the Congress Information of the State of the Union, and recommend to their Consideration such Measures as he shall judge necessary and expedient; he may, on extraordinary Occasions, convene both Houses, or either of them, and in Case of Disagreement between them, with Respect to the time of Adjournment, he may adjourn them to such Time as he shall think proper; he shall receive Ambassadors and other public Ministers; he shall take Care that the Laws be faithfully executed, and shall Commission all the officers of the United States.

**SECTION. 4.** The President, Vice President and all civil Officers of the United States, shall be removed from Office on Impeachment for, and Conviction of, Treason, Bribery, or other high Crimes and Misdemeanors.

### ARTICLE. III.

**SECTION. 1.** The judicial Power of the United States, shall be vested, in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behavior, and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office.

**SECTION. 2.** 'The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;—to all Cases affecting Ambassadors, other public Ministers, and Consuls;—to all Cases of admiralty and maritime Jurisdiction;—to Controversies to which the United States shall be a Party;—to Controversies between two or more States;—between a State and Citizens of another State;—between Citizens of different States,—between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

'In all Cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be Party, the supreme Court shall have original Jurisdiction. In all the other Cases before mentioned, the supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make.

'The Trial of all Crimes, except in Cases of Impeachment, shall be by Jury; and such Trial shall be held in the State where the said Crimes shall have been committed; but when not committed within any State, the Trial shall be at such Place or Places as the Congress may by Law have directed.

**SECTION. 3.** 'Treason against the United States, shall consist only in levying War against them, or in adhering to their Enemies, giving them Aid and Comfort. No Person shall be convicted of Treason unless on the Testimony of two Witnesses to the same overt Act, or on Confession in open Court.

'The Congress shall have Power to declare the Punishment of Treason, but no Attainder of Treason shall work Corruption of Blood, or Forfeiture except during the Life of the Person attainted.

### ARTICLE. IV.

**SECTION. 1.** Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State. And the Congress may by general Laws prescribe the Manner in which such Acts, Records and Proceedings shall be proved, and the Effect thereof.

**SECTION. 2.** 'The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States.

'A Person charged in any State with Treason, Felony, or other Crime, who



shall flee from Justice, and be found in another State, shall on Demand of the executive Authority of the State from which he fled, be delivered up, to be removed to the State having Jurisdiction of the Crime.

\*No Person held to Service or Labour in one State, under the Laws thereof, escaping into another, shall, in Consequence of any Law or Regulation therein, be discharged from such Service or Labour, but shall be delivered up on Claim of the Party to whom such Service or Labour may be due.

SECTION. 3. \*New States may be admitted by the Congress into this Union; but no new State shall be formed or erected within the Jurisdiction of any other State; nor any State be formed by the Junction of two or more States, or Parts of States, without the Consent of the Legislatures of the States concerned as well as of the Congress.

\*The Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States; and nothing in this Constitution shall be so construed as to Prejudice any Claims of the United States, or of any particular State.

SECTION. 4. The United States shall guarantee to every State in this Union a Republican Form of Government, and shall protect each of them against Invasion; and on Application of the Legislature, or of the Executive (when the Legislature cannot be convened) against domestic Violence.

#### ARTICLE. V.

The Congress, whenever two thirds of both Houses shall deem it necessary, shall propose Amendments to this Constitution, or, on the Application of the Legislatures of two thirds of the several States, shall call a Convention for proposing Amendments, which, in either Case, shall be valid to all Intents and Purposes, as Part of this Constitution, when ratified by the Legislatures of three fourths of the several States, or by Conventions in three fourths thereof, as the one or the other Mode of Ratification may be proposed by the Congress; Provided that no Amendment which may be made prior to the Year one thousand eight hundred and eight shall in any Manner affect the first and fourth Clauses in the Ninth Section of the first Article; and that no State, without its Consent, shall be deprived of its equal Suffrage in the Senate.

#### ARTICLE. VI.

\*All Debts contracted and Engagements entered into, before the Adoption of this Constitution, shall be as valid against the United States under this Constitution, as under the Confederation.

\*This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

\* The Senators and Representatives before mentioned, and the Members of the several State Legislatures, and all executive and judicial Officers, both of the

United States and of the several States, shall be bound by Oath or Affirmation, to support this Constitution; but no religious Test shall ever be required as a Qualification to any Office or public Trust under the United States.

## ARTICLE. VII.

The Ratification of the Conventions of nine States, shall be sufficient for the Establishment of this Constitution between the States so ratifying the Same.

DONE in Convention by the Unanimous Consent of the States present the Seventeenth Day of September in the Year of our Lord one thousand seven hundred and Eighty seven and of the Independance of the United States of America the Twelfth In Witness whereof We have hereunto subscribed our Names,

G<sup>o</sup> WASHINGTON—

*Presidt and Deputy from Virginia*

## NEW HAMPSHIRE.

JOHN LANGDON,

NICHOLAS GILMAN.

## MASSACHUSETTS.

NATHANIEL GORHAM,

RUFUS KING.

## CONNECTICUT.

WM. SAML. JOHNSON,

ROGER SHERMAN.

## NEW YORK.

ALEXANDER HAMILTON.

## NEW JERSEY.

WIL: LIVINGSTON,

DAVID BREARLEY,

WM. PATERSON,

JONA. DAYTON.

## PENNSYLVANIA.

B. FRANKLIN,

THOMAS MIFFLIN,

ROBT. MORRIS,

GEO: CLYMER,

THO<sup>s</sup>. FITZ SIMONS,

JARED INGERSOLL,

JAMES WILSON,

GOUV: MORRIS.

## DELAWARE.

GEO: READ,

GUNNING BEDFORD, jun.

JOHN DICKINSON,

RICHARD BASSETT.

JACO: BROOM.

## MARYLAND.

JAMES M'HENRY,

DAN: OF ST. THOS. JENIFER,

DANL. CARROLL.

## VIRGINIA.

JOHN BLAIR,

JAMES MADISON, JR.

## NORTH CAROLINA.

WM. BLOUNT,  
HU. WILLIAMSON.

RICH'D DOBBS SPAIGHT.

## SOUTH CAROLINA.

J. RUTLEDGE,  
CHARLES PINCKNEY,

CHARLES COTESWORTH PINCKNEY,  
PIERCE BUTLER.

## GEORGIA.

WILLIAM FEW,

ABR. BALDWIN.

Attest :

WILLIAM JACKSON, *Secretary.*

## ARTICLES

IN ADDITION TO, AND AMENDMENT OF,  
THE CONSTITUTION OF THE UNITED STATES  
OF AMERICA.

PROPOSED BY CONGRESS, AND RATIFIED BY THE LEGISLATURES OF THE  
SEVERAL STATES, PURSUANT TO THE FIFTH ARTICLE OF THE ORIGINAL CONSTITUTION.

## (ARTICLE 1.)

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

## (ARTICLE 2.)

A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed.

## (ARTICLE III.)

No Soldier shall, in time of peace be quartered in any house, without the consent of the Owner, nor in time of war, but in a manner to be prescribed by law.

## (ARTICLE IV.)

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

## (ARTICLE V.)

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any Criminal Case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

## (ARTICLE VI.)

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have Compulsory process for obtaining Witnesses in his favour, and to have the Assistance of Counsel for his defence.

## (ARTICLE VII.)

In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law.

## (ARTICLE VIII.)

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

## (ARTICLE IX.)

The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.

## (ARTICLE X.)

The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

## ARTICLE XI.

The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

## ARTICLE XII.

The Electors shall meet in their respective states, and vote by ballot for President and Vice President, one of whom, at least, shall not be an inhabitant of the same state with themselves; they shall name in their ballots the person

voted for as President, and in distinct ballots the person voted for as Vice-President, and they shall make distinct lists of all persons voted for as President, and of all persons voted for as Vice-President, and of the number of votes for each, which lists they shall sign and certify, and transmit sealed to the seat of the government of the United States, directed to the President of the Senate;—The President of the Senate shall, in presence of the Senate and House of Representatives, open all the certificates and the votes shall then be counted;—The person having the greatest number of votes for President, shall be the President, if such number be a majority of the whole number of Electors appointed; and if no person have such majority, then from the persons having the highest numbers not exceeding three on the list of those voted for as President, the House of Representatives shall choose immediately, by ballot, the President. But in choosing the President, the votes shall be taken by states, the representation from each state having one vote; a quorum for this purpose shall consist of a member or members from two-thirds of the states, and a majority of all the states shall be necessary to a choice. And if the House of Representatives shall not choose a President whenever the right of choice shall devolve upon them, before the fourth day of March next following, then the Vice-President shall act as President, as in the case of the death or other constitutional disability of the President.—The person having the greatest number of votes as Vice-President, shall be the Vice-President, if such number be a majority of the whole number of Electors appointed, and if no person have a majority, then from the two highest numbers on the list, the Senate shall choose the Vice-President; a quorum for the purpose shall consist of two-thirds of the whole number of Senators, and a majority of the whole number shall be necessary to a choice. But no person constitutionally ineligible to the office of President shall be eligible to that of Vice-President of the United States.

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### NOTE ON THE ORDINANCE OF 1787.

By permission of the writer, JOHN M. MERRIAM, Esq., I borrow the following extract from an elaborate paper prepared by him and presented at the semi-annual meeting of the American Antiquarian Society in Worcester, Mass., April 25th, 1888.

The mystery surrounding the enactment of this sixth article [excluding slavery] is explained, perhaps not with perfect satisfaction, by the publication of the "Life, Journal, and Correspondence of Manasseh Cutler." Mr. William F. Poole, of Chicago, first called attention to the very important influence exerted by Cutler, as the agent of the Ohio Company, in the formation and passage of both the "Ordinance of 1787" and the accompanying ordinance for the sale of land to the Ohio Company. The recent publication of Cutler's letters and diary has made it still clearer that the Ohio Company, represented in New York by Cutler when the subject of the Northwest Territory was at last considered with

energy, was the power which demanded and enforced from the hitherto undecided and irresolute Congress an ordinance for the government of their state or states which would secure the rights of property and of person, maintain education and religion, and irrevocably prohibit slavery.

A few passages from Cutler's "Life, Journal, and Correspondence" will serve to support this view.

April 7th, 1783, Timothy Pickering wrote a letter to Mr. Hodgdon, in which is the following passage: "But a new plan is in contemplation, no less than forming a *new state* westward of the Ohio. Some of the principal officers of the army are heartily engaged in it. About a week since the matter was set on foot and a plan is digesting for the purpose. Enclosed is a rough draft of some propositions respecting it, which are generally approved of. They are in the hands of General Huntington and General Putnam, for consideration, amendment, and addition."<sup>1</sup>

Here are three of the articles of the rough draft to which Pickering referred:

"11. That a Constitution for the new state be formed by the members of the association previous to their commencing the settlement, two thirds of the associators present at a meeting duly notified for that purpose agreeing therein. The total exclusion of slavery from the state to form an essential and irrevocable part of the Constitution.

"(12). That the associators, so assembled, agree on such general rules as they shall deem necessary for the prevention and punishment of crimes, and the preservation of peace and good order in the state; to have the force of laws during the space of two years unless an assembly of the state, formed agreeably to the Constitution, shall sooner repeal them.

"13. That the state so constituted shall be admitted into the Confederacy of the United States, and entitled to all the benefits of the Union, in common with the other members thereof."<sup>2</sup>

April 14, 1783, Colonel Pickering again writes to Mr. Hodgdon. He says, "General Putnam is warmly engaged in the new-planned settlement on the Ohio."<sup>3</sup>

Later a petition signed by two hundred and eighty-eight officers in the Continental army is presented to Congress praying for the location and survey of the western lands promised to them by the resolution of September 20, 1776. General Rufus Putnam is the first signer from Massachusetts. He writes a long letter to Washington stating the terms on which the petitioners propose to receive the lands, and in these terms are liberal provisions for the support of the ministry and of schools. This letter is submitted to Congress with the petition.

March 1st, 1786, the Ohio Company was formed in Boston, and later General Samuel H. Parsons, General Rufus Putnam, and Rev. Manasseh Cutler were chosen the three directors.

General Parsons made an unsuccessful application for the purchase of lands from Congress, after which the Ohio Company resolved to attempt to make "a

<sup>1</sup> Vol. I. 149.

<sup>2</sup> Ibid., 158.

<sup>3</sup> Ibid., 149.

private purchase of lands of the Honorable Congress," and Manasseh Cutler was authorized to conduct the purchase.

Before starting on his important mission he visits Boston and consults with Rufus Putnam. He writes of their interview: "Conversed with General Putnam. Received letters. Settled the principles on which I am to contract with Congress for lands on account of the Ohio Company."<sup>1</sup>

The day of this interview was June 25th, 1787. On the following day Cutler started for Providence on his way to New York. He arrived there July 5th, four days before the appointment of the final committee on the ordinance. During this time he was very diligent presenting letters of introduction to members of Congress, and others, and pushing his propositions in regard to the northwest lands. His greatest friend in Congress appears to have been Carrington of Virginia, who was made chairman of both the committee on the frame of government and the committee on the sale of lands.

He records in his diary, pp. 236, 237, that he had two conferences on the 9th with the committee. July 10th he states that he had another conference with the committee in the morning. His account of that day contains this significant paragraph: "As Congress was now engaged in settling the form of government for the federal territory, for which a bill had been prepared, and a copy sent to me with leave to make remarks and propose amendments, and which I had taken the liberty to remark upon, and to propose several amendments, I thought this the most favorable opportunity to go on to Philadelphia. Accordingly, after I had returned the bill with my observations I set out at seven o'clock and crossed North River to Paulus Hook."<sup>2</sup>

It seems probable that the bill which had been prepared and a copy of which had been sent to Cutler, and to which he had proposed amendments, was the ordinance reported by Johnson and read a second time on May 9th, inasmuch as this extract shows that the copy with Cutler's proposed amendments was returned July 10th, and the committee which drafted the final ordinance was appointed only the day before. Unless, therefore, the committee took immediate action on the day of their appointment, and revised the work of the former committee sufficiently to offer a complete ordinance to Cutler, he must have received a copy of the old report which had been referred to Carrington's committee. This report had, as has already been stated, passed a second reading, and had been printed. When Cutler had returned to New York after the ordinance had been enacted, he was provided with a copy of it, as the following entry in his diary shows: "July 19th, Called on members of Congress very early this morning. Was furnished with the Ordinance establishing a government in the western federal territory. It is in a degree new modelled. The amendments I proposed have all been made except one, and that is better qualified."

The statement that "it is in a degree new modelled" seems to justify the inference that comparison was made with the bill which had been sent to Cutler, and that that bill was the ordinance which was at that time on the table of Congress.

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<sup>1</sup> Vol. I., 204.    <sup>2</sup> Manasseh Cutler, *Life, Journal, and Correspondence*, I. 242.

These passages from Cutler's diary show conclusively that he went to New York armed with great power, and for definite purposes which had been discussed and agreed upon with Rufus Putnam before he started. The precise articles in the final ordinance which were due to the foresight and wisdom of Putnam and Cutler cannot now be precisely pointed out. It seems probable, however, in view of the earlier stand taken by Putnam and Pickering and their associates, that provisions for the support of religion and education, and the prohibition of slavery, were among the terms of the negotiation. It is only upon this supposition that the readiness of Congress to agree upon the sixth article can be explained.





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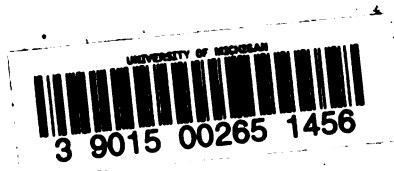






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